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UNITED STATES COPYRIGHT ROYALTY JUDGES

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IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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CONDENSED TRANSCRIPT WITH KEYWORD INDEX

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<p>1 UNITED STATES COPYRIGHT ROYALTY JUDGES 2 The Library of Congress 3 -----X 4 IN THE MATTER OF:) 5) Docket No. 6 DETERMINATION OF CABLE) 14-CRB-0010-CD 7 ROYALTY FUNDS) (2010-2013) 8 -----X 9 BEFORE: THE HONORABLE SUZANNE BARNETT 10 THE HONORABLE JESSE M. FEDER 11 THE HONORABLE DAVID R. STRICKLER 12 13 Library of Congress 14 Madison Building 15 101 Independence Avenue, S.E. 16 Washington, D.C. 17 March 13, 2018 18 19 9:06 a.m. 20 VOLUME XIV 21 22 23 Reported by: Karen Brynteson, RMR, CRR, FAPR 24 25</p>	<p>1 APPEARANCES (Continued): 2 On behalf of Program Suppliers: 3 GREGORY O. OLANIRAN, ESQ. 4 LUCY HOLMES PLOVNIK, ESQ. 5 ALESHA M. DOMINIQUE, ESQ. 6 ALBINA GASANBEKOVA, ESQ. 7 DIMA BUDRON, ESQ. 8 Mitchell Silberberg & Knupp LLP 9 1818 N Street, N.W., 8th Floor 10 Washington, D.C. 20036 11 202-355-7917 12 13 On behalf of Public Television Claimants: 14 RONALD G. DOVE, Jr., ESQ. 15 DUSTIN CHO, ESQ. 16 ROBERT N. HUNZIKER, JR., ESQ. 17 Covington & Burling LLP 18 One CityCenter 19 850 Tenth Street, N.W. 20 Washington, D.C. 20001 21 202-662-4956 22 23 24 25</p>
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<p>1 A P P E A R A N C E S: 2 On behalf of Joint Sports Claimants: 3 ROBERT ALAN GARRETT, ESQ. 4 M. SEAN LAANE, ESQ. 5 DANIEL A. CANTOR, ESQ. 6 MICHAEL KIENZLE, ESQ. 7 BRYAN L. ADKINS, ESQ. 8 Arnold & Porter Kaye Scholer LLP 9 601 Massachusetts Avenue, N.W. 10 Washington, D.C. 20001 11 202-942-5000 12 13 IAIN R. McPHIE, ESQ. 14 Squire Patton Boggs LLP 15 2500 M Street, N.W. 16 Washington, D.C. 20037 17 202-626-6688 18 On behalf of Commercial Television Claimants: 19 JOHN I. STEWART, Jr., ESQ. 20 DAVID ERVIN, ESQ. 21 ANN MACE, ESQ. 22 Crowell & Moring LLP 23 1001 Pennsylvania Avenue, N.W. 24 Washington, D.C. 20004 25 202-624-2685</p>	<p>1 APPEARANCES (Continued): 2 On behalf of Canadian Claimants Group: 3 L. KENDALL SATTERFIELD, ESQ. 4 Satterfield PLLC 5 1629 K Street, N.W., Suite 300 6 Washington, D.C. 20006 7 202-355-6432 8 9 VICTOR J. COSENTINO, ESQ. 10 Larson & Gaston, LLP 11 200 S. Los Robles Avenue, Suite 530 12 Pasadena, CA 91101 13 626-795-6001 14 15 On behalf of Settling Devotional Claimants: 16 ARNOLD P. LUTZKER, ESQ. 17 BENJAMIN STERNBERG, ESQ. 18 Lutzker & Lutzker LLP 19 1233 20th Street, N.W., Suite 703 20 Washington, D.C. 20036 21 202-408-7600 22 23 24 25</p>

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<p style="text-align: right;">3167</p> <p>1 APPEARANCES (Continued): 2 On behalf of Settling Devotional Claimants: 3 MATTHEW J. MacLEAN, ESQ. 4 MICHAEL A. WARLEY, ESQ. 5 JESSICA T. NYMAN, ESQ. 6 Pillsbury Winthrop Shaw Pittman LLP 7 1200 Seventeenth Street, N.W. 8 Washington, D.C. 20036 9 202-663-8183</p>	<p style="text-align: right;">3169</p> <p>1 JUDGE BARNETT: Off the record. 2 (Discussion off the record.) 3 Whereupon-- 4 DANIEL HARTMAN, 5 a witness, called for examination, having previously 6 been duly sworn, was examined and testified further as 7 follows: 8 JUDGE BARNETT: Mr. Hartman, you 9 remain under oath. 10 THE WITNESS: Yes. Okay. 11 JUDGE BARNETT: Mr. Cantor? 12 MR. CANTOR: Good morning, Your 13 Honors. 14 DIRECT EXAMINATION -- RESUMED 15 BY MR. CANTOR: 16 Q. Mr. Hartman, when we were breaking for 17 the day yesterday, you were just finishing 18 summarizing for us why DirecTV carried WGNA 19 during the period of 2010 to 2013. 20 Just for -- to kind of reset the 21 context, would you please just briefly 22 summarize these reasons for us now. 23 A. Oh, sure. So I think I walked through 24 the fact that we -- you know, in our decision 25 to launch it and continue carrying it, we -- we</p>
<p style="text-align: right;">3168</p> <p>1 P R O C E E D I N G S 2 (9:06 a.m.) 3 JUDGE BARNETT: Good morning. Please 4 be seated. 5 We brought over a book truck for these 6 binders. It narrows that passageway even 7 further. But it appears we are not -- we don't 8 have a witness. 9 Mr. Cantor? 10 MR. CANTOR: Yes, we do. Mr. Hartman 11 is in the back of the room. 12 JUDGE BARNETT: Oh, there he is, 13 hiding. Okay. 14 MR. CANTOR: Shall he take the stand? 15 JUDGE BARNETT: Mr. Garrett looked 16 like he might have something, some preliminary? 17 MR. GARRETT: No, Your Honor, but I 18 can make one up if you would like. 19 (Laughter.) 20 JUDGE BARNETT: Let's just go ahead 21 with Mr. Hartman. 22 (Laughter.) 23 MR. GARRETT: I'll catch you later, 24 Your Honor.</p>	<p style="text-align: right;">3170</p> <p>1 put a high value on the live team sports. So 2 it had 100 games, which is comparable to what 3 you might find on a regional sports network, 4 and served a national audience. You know, we 5 just didn't find as much value on clearly 6 something like infomercials, which took a big 7 part of the day, overnights or the, you know, 8 the more syndicated movie-type content, the 9 kind of stuff you find other places. 10 Q. Have you reviewed the written 11 testimony of Mr. Mansell, one of the Program 12 Suppliers' witnesses? 13 A. Yes, I have. 14 Q. Mr. Mansell asserts that during this 15 period, 2010 to 2013, that there was a 16 proliferation of regional sports networks, and 17 he asserts that this proliferation devalued or 18 reduced the volume of the team sports on 19 distantly transmitted signals. 20 Do you have an opinion about 21 Mr. Mansell's statement? 22 A. Yeah, I do. I think there are -- I 23 have a couple of opinions. One, I think he's 24 right when he talks about, you know, the high 25 value of sports. We talked about it a little</p>

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<p style="text-align: right;">3171</p> <p>1 bit yesterday. And the fact that, you know, 2 these sports costs really are going through the 3 roof and, you know, doubling what non-sports 4 costs are. 5 So I think it -- it's true that there 6 are -- you know, these sports costs are 7 increasing, but I think that it just goes to 8 show you that people are paying these rights 9 fees because sports are so important. 10 But I also think that it shows when he 11 does talk about the -- you know, the fact that 12 these new RSNs are popping up over the last 15 13 or 20 years, and that's also true, that, again, 14 I think it just goes to show you the power of 15 live team sports. 16 I think that there's no other content 17 I'm aware of, you know, in all my years at 18 DirecTV, that you could take and form a new 19 network and get carriage, get, you know, good 20 distribution, if not full distribution, at a 21 high license fee, other than just live sports. 22 I think, you know, operators weren't 23 thrilled when these new networks, these RSNs 24 came along, but we knew we had to have them. 25 Q. Do you know how the amount of team</p>	<p style="text-align: right;">3173</p> <p>1 A. Yes. This is the table where the 2 White Sox -- the number of White Sox games in 3 2010 should read 32, so that total in 2010 4 should read 117 -- 116, excuse me. 5 Q. And does that correction at all change 6 your opinion? 7 A. No, no. 8 Q. And we're going to put on the screen 9 now Table Roman numeral III-2 from your written 10 rebuttal testimony. 11 Would you please tell us what this is? 12 A. Sure. So this is a similar table. It 13 shows the Major League Baseball telecasts on 14 Fox for those two periods that we were talking 15 about. So it just -- if you go down the left 16 side there, it just details the type of game, 17 regular season, all star, league division, 18 league championship, world series, and then 19 totals at the bottom, the total number of 20 telecasts. So, again, for 2004 and 2005, you 21 can see the totals there at the bottom. 22 Jump to 2010 through 2013, and, again, 23 you can see the totals, and there's really -- 24 really no difference, maybe a game or two, but 25 nothing at all that I would deem material.</p>
<p style="text-align: right;">3172</p> <p>1 sports on WGNA in the period -- in the period 2 2004 to 2005 as compared to 2010 to 2013, how 3 the volume of sports compared between those 4 periods? 5 A. It didn't decline. 6 Q. And if I can, let's put up on the 7 screen Table Roman numeral III-1 from your 8 written rebuttal testimony, please. Would you 9 please tell us what this is? 10 A. Sure. This is a table that sets forth 11 the -- basically the JSC telecasts that 12 appeared on WGNA for those two periods that you 13 just referenced. So if you look at the table, 14 it walks you through the number of Cubs games, 15 White Sox games, and Bulls games for 2004 and 16 2005, and you can see the totals at the bottom 17 there. 18 And then you jump to 2010 through 19 2013, again, you can see the totals at the 20 bottom, and there's no -- there's no decrease. 21 In fact, there's probably a slight increase in 22 number of games. 23 Q. And is this the table that you offered 24 a correction on at the beginning of your 25 testimony yesterday?</p>	<p style="text-align: right;">3174</p> <p>1 Q. And now we're going to put on Table 2 Roman numeral III-3 from your rebuttal 3 testimony. And would you likewise explain to 4 us what this chart shows. 5 A. Sure. So this is a similar telecast, 6 which just lays out the NFL telecasts that 7 appeared on the Fox network for those two 8 periods. And, again, on the left side -- on 9 the left side, you can see it's preseason 10 games, regular season, playoffs, Superbowl, and 11 Pro Bowl. So it lists the type of games. And 12 then for the totals 2004-2005 there at the 13 bottom, you can see the numbers. 14 And again if you jump to 2010 through 15 2013, it's virtually identical. So, again, no 16 decline there. 17 Q. In Mr. Mansell's written testimony, 18 did he address changes in the media programming 19 landscape outside of team sports programming? 20 A. No, he didn't. I think that if he 21 had, I think he would have -- if you would have 22 looked at -- because I know he brings up the 23 fact that all these new technologies have 24 created these new opportunities, and I think 25 that's also correct in his testimony, but I</p>

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<p>1 think what that has led to as well is the 2 proliferation of the more non-sports type 3 content, sitcoms and movies, just going to more 4 sources. So not only is it, you know, 5 increasing across the number of networks it's 6 on but then there's all these new platforms 7 like Netflix and Hulu and Amazon and YouTube 8 that you'll find this content as well. 9 Q. Thank you. Let's turn back to the 10 Bortz survey for a minute. 11 Did you reach any opinion about the 12 results of the Bortz survey? 13 A. Yeah, I guess based on my experience, 14 his findings were consistent with how I think a 15 multi-channel executive would basically value 16 the categories of programming. 17 Q. So we yesterday were talking a bit 18 about the written testimony of Program 19 Suppliers witness Ms. Sue Ann Hamilton. 20 A. Um-hum. 21 Q. Ms. Sue Ann Hamilton suggests that the 22 program categories adopted for this proceeding 23 and that were used in the Bortz survey would be 24 -- would be, I think her words were, confusing 25 to distributors.</p>	<p>1 A. Yeah. I mean, it's true that we do 2 mostly negotiate for linear channels, but I 3 think when you look at the types of linear 4 channels that we negotiate for, they really do 5 fall into categories such as news or movies or 6 sports. 7 So I think that just, you know, kind 8 of by default, we negotiate for different types 9 of programming, even though it may be a channel 10 of programming, but I think that it's -- 11 basically, it's our day-to-day job to kind of 12 know those, that type of programming. 13 Q. Thank you, Mr. Hartman. I have no 14 further questions. 15 CROSS-EXAMINATION 16 BY MS. PLOVNICK: 17 Q. Good morning, Mr. Hartman. 18 A. Good morning. 19 Q. I'm Lucy Plovnick. I represent 20 Program Suppliers. How are you? 21 A. Good, thank you. 22 Q. All right. So, Mr. Hartman, I want to 23 start with your direct testimony, which was 24 Exhibit 10-10, or 1010. And if you flip to 25 Appendix A, which is your resume at the back.</p>
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<p>1 Do you agree with her on that? 2 A. No, because I think that they're -- it 3 seems pretty -- they seem pretty self-evident 4 and clear to me. I think that if you look at, 5 you know, live professional college team 6 sports, I think that's fairly -- I think if you 7 asked a -- an executive in our business, what 8 that meant they would say that it really speaks 9 to the major -- the marquee leagues, NFL, MLB, 10 et cetera, and kind of the premier or marquee 11 college team sports like basketball and 12 football. 13 Q. Did you also review the testimony of 14 Program Supplier witness Dr. Joel Steckel? 15 A. Yes, I did. 16 Q. Dr. Steckel asserts, among other 17 things, that the task of asking distributors to 18 value different types of programming would be 19 what he calls unfamiliar. 20 And he says that's so because 21 distributors typically purchase whole channels 22 of programming, rather than, you know, 23 individual pieces of programming. 24 Do you have a view about his 25 assertion?</p>	<p>1 A. Oh, okay. 2 Q. So just to confirm, you worked at 3 DirectTV from 1998 to 2013; is that correct? 4 A. That's correct. 5 Q. And before that, you worked at Fox 6 Broadcasting and Fox Sports? 7 A. That's correct. 8 Q. But you have never been a cable 9 operator; is that correct? 10 A. I have never been a cable operator, 11 but I've worked in the MVPD industry. 12 Q. In the MVPD industry. And you would 13 define that as cable and satellite industry 14 combined, when you define -- or just define 15 MVPD. 16 A. Well, I think it is the more 17 traditional technologies of satellite and 18 cable. 19 Q. Right. But just to be -- 20 A. Just that these bubbles are the same. 21 Q. Just to be clear, though, you have 22 never worked in the cable side of this 23 industry; your experience is in the satellite 24 side of this industry? 25 A. I have never worked for a cable</p>

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3179	<p>1 company.</p> <p>2 Q. All right. Now, you mentioned some</p> <p>3 boards that you worked on at the bottom and you</p> <p>4 mentioned The Tennis Channel?</p> <p>5 A. Um-hum.</p> <p>6 Q. And you also mentioned the Southern</p> <p>7 California Committee for the Olympic Games.</p> <p>8 A. Um-hum.</p> <p>9 Q. Do you consider tennis and the</p> <p>10 Olympics to be sports?</p> <p>11 A. Do I consider them to be -- sports as</p> <p>12 a very general category?</p> <p>13 Q. Well --</p> <p>14 A. I mean, if you're talking about a</p> <p>15 broad category of sports, yes, there's --</p> <p>16 Q. Is it sports or is it not sports?</p> <p>17 A. -- there's 50 different sports, so --</p> <p>18 Q. Is it sports or not sports?</p> <p>19 A. It's not live team sports, but it's --</p> <p>20 Q. But it's --</p> <p>21 A. -- tennis is a sport.</p> <p>22 Q. Tennis is a sport, but you wouldn't</p> <p>23 consider it live team sports?</p> <p>24 A. That's correct.</p> <p>25 Q. All right. Would you consider the</p>	3181	<p>1 reported in to me.</p> <p>2 Q. They reported to you?</p> <p>3 A. Yes.</p> <p>4 Q. And were you involved in those</p> <p>5 decisions?</p> <p>6 A. I was -- yes, for the -- yes, I was</p> <p>7 involved in -- in the bigger local station</p> <p>8 deals, and I was definitely involved in the</p> <p>9 distant signal carriage deals.</p> <p>10 Q. Involved as in you participated or you</p> <p>11 just approved what the team under you --</p> <p>12 A. Both. I mean, if it was a -- there</p> <p>13 wasn't a lot of distant signal carriage, other</p> <p>14 than WGNA, and unless you're talking about the</p> <p>15 big four broadcast networks, so by the time I</p> <p>16 came in and took over the group, there wasn't</p> <p>17 really, to my knowledge, a lot of new distant</p> <p>18 networks being launched.</p> <p>19 Q. So did that analysis that you would do</p> <p>20 in deciding to carry -- well, really everything</p> <p>21 you did but also, in particular, distant</p> <p>22 broadcast stations, did that include an</p> <p>23 analysis or review of Nielsen viewing</p> <p>24 information?</p> <p>25 A. No, it didn't.</p>
3180	<p>1 Olympics live team sports?</p> <p>2 A. No.</p> <p>3 Q. All right. Now, let's move to</p> <p>4 paragraph 3 of your direct testimony. And</p> <p>5 that's on page 1.</p> <p>6 A. Okay.</p> <p>7 Q. So about two-thirds of the way down,</p> <p>8 you're talking about your experience at</p> <p>9 DirecTV, and you say that you were "responsible</p> <p>10 for DirecTV's program acquisition activities</p> <p>11 with respect to all general entertainment and</p> <p>12 premium cable networks, as well as initiatives</p> <p>13 such as video-on-demand programming and the</p> <p>14 development of DirecTV's TV Everywhere</p> <p>15 platform."</p> <p>16 Is that correct?</p> <p>17 A. Yes.</p> <p>18 Q. So did you also -- were you also</p> <p>19 responsible for programming selections with</p> <p>20 regard to distant signals while at DirecTV?</p> <p>21 A. Yes, so that, when I was senior vice</p> <p>22 president during that period of 2007 through</p> <p>23 2013, the group that I -- there was an entire</p> <p>24 group of -- of folks that negotiated our local</p> <p>25 station and distant carriage. And they all</p>	3182	<p>1 Q. Nielsen ratings information?</p> <p>2 A. No. I mean, again, there -- there --</p> <p>3 the -- well, when I was -- when the group was</p> <p>4 reporting in to me, there was, again, very few</p> <p>5 -- if you look at the statement of accounts</p> <p>6 that DirecTV filed with the Copyright Office,</p> <p>7 you have WGNA, which is this huge chunk, and</p> <p>8 then you have the big four broadcast networks,</p> <p>9 affiliates of the big four broadcast networks,</p> <p>10 for instance, maybe New York and L.A. stations,</p> <p>11 which is another decent size chunk, and kind of</p> <p>12 independent distant are -- were just a very</p> <p>13 small part of that.</p> <p>14 So I don't -- but to answer your</p> <p>15 question, no, I don't recall that we ever</p> <p>16 looked at, you know, ratings would have made a</p> <p>17 difference. It was really about getting big</p> <p>18 four broadcast networks into a market.</p> <p>19 Q. So -- and you mentioned statements of</p> <p>20 account. Did you prepare the statements of</p> <p>21 account for DirecTV?</p> <p>22 A. I did not. We had an accounting group</p> <p>23 that would have prepared those.</p> <p>24 Q. Did you review them as a part of your</p> <p>25 work at DirecTV?</p>

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<p>1 A. Yes.</p> <p>2 Q. So you would review them before they</p> <p>3 went out or just in the course of -- you said</p> <p>4 the Accounting Department.</p> <p>5 A. The Accounting Department would bring</p> <p>6 to me and we would just run through them and I</p> <p>7 would sign them.</p> <p>8 Q. You would sign them, but you would</p> <p>9 review them first or you would just accept that</p> <p>10 --</p> <p>11 A. They would basically do a quick</p> <p>12 walk-through with me, but I did not review them</p> <p>13 station by station or, you know, subscriber</p> <p>14 detail or anything like that.</p> <p>15 Q. Right.</p> <p>16 A. They had all the records so I trusted</p> <p>17 them.</p> <p>18 Q. So, Mr. Hartman, when you were working</p> <p>19 at DirecTV, did you work with a person named</p> <p>20 Toby Berlin?</p> <p>21 A. Yes, I did.</p> <p>22 Q. Ms. Berlin also worked at DirecTV from</p> <p>23 1998 to 2013; is that correct?</p> <p>24 A. She did. And she reported to me for</p> <p>25 several of those years in the end.</p>	<p>1 reported in to me, she was not a part of.</p> <p>2 Q. But she -- so are you aware that she</p> <p>3 has testified here in proceedings --</p> <p>4 A. Yes.</p> <p>5 Q. -- before the Copyright Royalty</p> <p>6 Judges?</p> <p>7 A. Yes.</p> <p>8 Q. Have you reviewed her testimony?</p> <p>9 A. I have.</p> <p>10 Q. All right. Let's take a look at her</p> <p>11 testimony. So if you --</p> <p>12 MR. PLOVNICK: Oh, and before we do</p> <p>13 that, Your Honor, as a housekeeping matter, I</p> <p>14 understand that all the parties have agreed to</p> <p>15 stipulate to the admission of MPAA Exhibits</p> <p>16 6041 through 6044, inclusive. And I would move</p> <p>17 their admission before we actually start</p> <p>18 looking at them.</p> <p>19 JUDGE BARNETT: Hearing no objection,</p> <p>20 6041 through 60 -- did you say 44?</p> <p>21 MS. PLOVNICK: 44, yes, Your Honor.</p> <p>22 JUDGE BARNETT: Inclusive, are</p> <p>23 admitted.</p> <p>24 (Exhibit Numbers 6041, 6042, 6043,</p> <p>25 6044 were marked and received into evidence.)</p>
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<p>1 Q. Ms. Berlin was a vice president of</p> <p>2 programming acquisitions?</p> <p>3 A. Correct.</p> <p>4 Q. Was she a part of the team that you</p> <p>5 were describing that worked under your</p> <p>6 direction?</p> <p>7 A. She was part of the team -- the local</p> <p>8 channel team or --</p> <p>9 Q. Well, you tell me.</p> <p>10 A. Yeah. Okay. So she was involved in</p> <p>11 local channel launches, I think back in the</p> <p>12 early days, you know, around the early 2000s, I</p> <p>13 think, and then segued into different areas.</p> <p>14 So when she was reporting to me, she was</p> <p>15 working on -- she would negotiate our adult</p> <p>16 programming deals. She negotiated our airborne</p> <p>17 deals, she negotiated our Pay Per View</p> <p>18 contracts, boxing and wrestling. She worked on</p> <p>19 ethnic platform. I think that was about it.</p> <p>20 Q. And she also was involved with distant</p> <p>21 signals as well, was she not?</p> <p>22 A. Not when she was reporting to me, no.</p> <p>23 Q. Not when she was reporting to you?</p> <p>24 A. No. That all came through the</p> <p>25 station -- the local station group, which</p>	<p>1 BY MS. PLOVNICK:</p> <p>2 Q. So take a look at Exhibit 6041, which</p> <p>3 is which is the written direct testimony of</p> <p>4 Toby Berlin from the 2004 through 2009 cable</p> <p>5 and 1999 through 2009 satellite Phase II</p> <p>6 proceeding.</p> <p>7 A. Okay.</p> <p>8 Q. Do you see that?</p> <p>9 A. Yes, I see that -- yes, the front page</p> <p>10 here, yes.</p> <p>11 Q. All right. And so if you turn to page</p> <p>12 6 of that testimony, and you look under heading</p> <p>13 D at the bottom of the page, and you see the</p> <p>14 heading that says "importance of program</p> <p>15 ratings"?</p> <p>16 A. Um-hum.</p> <p>17 Q. So if you just take a look -- and have</p> <p>18 you had a chance to review this testimony?</p> <p>19 A. I -- I did. Yes.</p> <p>20 Q. So what Ms. Berlin says here, at the</p> <p>21 bottom of page 6 and carrying over to page 7,</p> <p>22 and I'll just, you know, read it, "In deciding</p> <p>23 whether or not to carry that station on an out-</p> <p>24 of market basis, we would look at ratings, just</p> <p>25 like our cable competitors. Our marketing and</p>

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<p style="text-align: right;">3187</p> <p>1 business analytics departments would supply a 2 list of stations in a DMA with their Nielsen 3 ratings. If a station had high ratings, and 4 cable had it or we believed it would bolster 5 our line-up because it had high ratings, we 6 would carry the station out of market and pay 7 copyright royalties. Ratings were the single 8 most significant factor that the business team 9 considered when evaluating new programming 10 acquisition opportunities. The Nielsen ratings 11 and other audience measurement tools play a 12 pivotal role in determining the true value of a 13 signal and its constituent programs. This is 14 consistent with the very simple paradigm that 15 satellite operators value programs that people 16 watch and do not value programs that people do 17 not watch. Based on my years of experience in 18 the subscription television industry, I would 19 say other satellite service providers and cable 20 operators all viewed ratings as a principal 21 measure of value within a defined genre of 22 programming." 23 So would you agree or disagree with 24 Ms. Berlin's testimony? 25 A. I would disagree with that.</p>	<p style="text-align: right;">3189</p> <p>1 mattered. 2 But I can speak more generally too. I 3 would like to speak more generally because I 4 think she's -- she was not involved -- the 5 types of programming she worked on for most of 6 the time she was at DirecTV, most of it didn't 7 even involve seeing ratings. I mean, Pay Per 8 View events, she worked on the music channels, 9 she worked on, again, adult. A lot of the 10 ethnic programming is Pay Per View packages. 11 So she would not have been -- you 12 know, I think I can speak much better to the 13 fact of whether or not we used ratings overall, 14 you know, in the general platform and 15 negotiations and decisions, and I can say that 16 there were -- again, as I said in my testimony 17 yesterday, they were -- you know, they just 18 really not determinative. We definitely looked 19 at them but -- 20 Q. Well, so -- so from reviewing 21 Ms. Berlin's testimony, it's clear that ratings 22 were important to her. 23 A. I can't speak for her. I can only 24 speak for the fact that, you know, I was the 25 head -- I ran the programming group and --</p>
<p style="text-align: right;">3188</p> <p>1 Q. You would disagree? 2 A. Yes. I think that you can look at it 3 from two different perspectives, as I was 4 reading through it. And one is just when 5 you're talking about distant signals -- and I 6 can speak to the period, you know, from about 7 2007 or so on when, again, the station group 8 reported in to me and we did not use ratings 9 for distant signals. Again, any market that we 10 were bringing distant signals in, it was 11 basically trying to get the big four networks, 12 which is what were most important to the 13 customers. 14 You know, I can't speak to when she 15 was -- the early, I guess, 2000s, I wasn't part 16 of that group then, but, again -- and I read 17 her example of trying to, I think, bring in 18 signal from San Diego into L.A. or vice versa, 19 and, I mean, I guess just speaking from I was 20 at the company then and I was involved in 21 obviously the -- just in knowing kind of how 22 the company worked, I just think that any 23 distant signals brought in that weren't a big 24 four affiliate were really around the edges. 25 And I don't know that ratings would have</p>	<p style="text-align: right;">3190</p> <p>1 Q. So is it fair to say that within a 2 single organization like DirecTV, that 3 different individuals have different opinions 4 about what's important in their 5 decision-making? 6 A. Again, I can't speak to her. Maybe 7 she does have a different opinion. I -- 8 Q. Well, she clearly does. 9 A. She reported in to me for a long 10 period of the time while I was a senior vice 11 president there. And I -- I don't recall her 12 ever coming to me and bringing ratings and 13 saying this makes a difference or -- I don't 14 know how she would have necessarily used these 15 ratings. So I -- 16 Q. You don't -- 17 JUDGE FEDER: Excuse me. 18 THE WITNESS: Sure. 19 JUDGE FEDER: Mr. Hartman, a moment 20 ago you said "around the edges." What do you 21 mean by that? 22 THE WITNESS: Oh, I think it's -- I 23 mean, I think maybe -- and I was trying to 24 understand -- like I said, I have to admit I 25 didn't quite really understand her example.</p>

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1 She didn't give certain -- she didn't give a
2 specific station to say we launched KQED or
3 something because, you know -- or we brought it
4 in distantly because it was important.

5 I was -- I was thinking that maybe she
6 was talking more about maybe devotional or
7 other types of programming, that, you know, may
8 have been kind of a one-off. Like maybe it's
9 worth it to bring in this one distant signal
10 because maybe it does serve a particular niche.
11 But I don't think -- again, I think that was
12 just around the edges. It wasn't like we were
13 doing that in multiple markets as I understand
14 it.

15 BY MS. PLOVNICK:

16 Q. All right. So -- but you don't know
17 what Ms. Berlin considered or didn't consider
18 in her programming decisions?

19 A. Well, again, I'm trying to think how
20 she would have used ratings for the types of
21 work she worked on when she was reporting to
22 me. It wouldn't have -- it wouldn't have
23 factored in. And she wouldn't have been in --
24 she was never in any negotiations for the
25 general market platform, all the deals I worked

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1 on, which is, you know, the vast majority of
2 the programming. So I'm not sure, you know --
3 again, I can't speak for her, but I can only
4 speak for my experience as running the
5 programming group.

6 Q. Right. You speak from your
7 experience, but she clearly has a different
8 view of what's important than you do.

9 A. She -- her testimony says that.

10 Q. All right. If we look in the next
11 paragraph of her testimony, she says, "One
12 reason ratings are crucial is because it is
13 difficult to discontinue a channel after a
14 commitment has been made to include it. Once a
15 decision was made to carry a station out of
16 market, DirecTV rarely, if ever, pulled it from
17 the DMA, unless that DMA became 'served' or if
18 that network's station launched in the DMA.
19 The reason we never pulled a station once
20 launched is that every station had some local
21 constituency, usually" --

22 JUDGE STRICKLER: Loyal, loyal
23 constituency?

24 MS. PLOVNICK: I'm sorry -- loyal
25 constituency -- you're right, Your Honor.

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1 BY MS. PLOVNICK:

2 Q. -- "loyal constituency, usually a
3 niche audience. However small it might be, we
4 never wanted to have subscribers retaliate by
5 'churning' off the platform or discontinuing
6 service. So it was a common practice of
7 DirecTV that once a station's carriage
8 commenced, the signal rarely went dark or was
9 pulled off the air."

10 Would you agree with that testimony of
11 Ms. Berlin?

12 A. Well, no. I mean, I don't -- I do --
13 you know, I think you can look at the history
14 of DirecTV, and probably cable as well, and
15 it's not commonplace for cable networks or
16 stations to be pulled. I mean, it is a last
17 resort.

18 It's happening more and more with
19 broadcasts with the station groups, because the
20 fees they are asking for are so high. You
21 know, we did drop networks. I think that, you
22 know, usually when you're coming down to the
23 wire in a negotiation, last week or two, and
24 you see the crawls on screen and you see people
25 messaging about losing channels, it really does

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1 bring the parties to the table.

2 But I wouldn't agree -- you know, I
3 worked on our Viacom deal in 2012 where we
4 dropped 14 Viacom channels for about two weeks
5 just because of the deal there. So, you know,
6 I do -- it's not -- you don't relish pulling
7 programming, but I think when you have to look
8 at the decision for pulling programming, you
9 know, the biggest factor is are you going to
10 lose customers?

11 And I think that, you know, in my
12 testimony yesterday, live sports was the most
13 important -- was the category we were most
14 worried about if we had to drop.

15 Q. Dropping a channel -- the reason you
16 would not drop a channel you carry along for a
17 long period of time was because you were afraid
18 that you would lose customers?

19 A. Well, no. I think it's just a matter
20 of degrees. So I think that, yes, every
21 channel, you could -- yes, every channel has
22 somebody, it's somebody's favorite. DirecTV
23 had 20 million customers so you're going to
24 find somebody that -- but I think that when you
25 made the decision -- when we discussed

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1 decisions to drop -- again, this is just
2 another point, that ratings never factored into
3 that decision.

4 The last couple of weeks we were
5 polling customers, we were kind of trying to
6 run numbers as to, okay, you know, is this
7 programming so important that we're going to
8 lose customers quickly? Do they have other
9 alternates? So if it's a movie channel, we can
10 just, you know, tell them to go watch -- you
11 know, there's other -- five other movie
12 channels on DirecTV, so you'll find a
13 substitute with -- again, live sports, that was
14 our biggest category that we were most worried
15 about dropping.

16 Q. But you agree with Ms. Berlin that you
17 would rarely, if ever, drop a station if you
18 could help it?

19 A. Yes, we -- the goal was always to
20 reach a deal with every programmer.

21 Q. Would you describe continuing to carry
22 these signals as legacy carriage?

23 A. No, because I think every time a deal
24 came up, you know, whether it be four, five,
25 six years, there was a review of the value of

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1 the network and whether or not it made sense to
2 keep on the platform.

3 Q. And you usually decided it made sense
4 to keep the same signals on the platform if you
5 could?

6 A. Well, I mean, I guess if you're asking
7 if we dropped a lot of networks, no, we didn't.
8 But every -- every channel was examined every
9 time it came up for renewal.

10 So if the value equation wasn't there,
11 then we would become much tougher in our
12 negotiation. And then we would usually reach a
13 deal and it was -- then it would be more
14 favorable to us.

15 Q. The goal was to reach a deal to
16 maintain the same carriage because the
17 subscribers would not be happy if they didn't
18 continue to get the signals that they cared
19 about?

20 A. Yes, it's a matter of degrees, like I
21 said. You know, every channel has somebody,
22 it's somebody's favorite. So the goal, of
23 course, was to keep as much programming on the
24 platform as we could because, yes, that is the
25 way to keep customers happy.

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1 Q. All right. So let's just switch gears
2 for a little bit.

3 And, Dima, you can take that off.

4 Let's just talk a little bit about
5 programming decisions in general. So -- and I
6 think you testified that when a satellite
7 carrier makes a programming decision, it's
8 usually about whether to carry a whole station
9 or a whole cable network. You're not usually
10 selecting individual programs or categories of
11 programs. Is that correct?

12 A. Yes. Our negotiations for -- if
13 you're asking about, yes, the negotiations at
14 DirecTV are generally for linear channels.

15 Q. And sometimes you would purchase
16 multiple signals or networks in a package or
17 bundle; is that correct as well?

18 A. Yes, from the same content owner?

19 Q. Yes.

20 A. Yes.

21 Q. So --

22 JUDGE STRICKLER: Excuse me, counsel.

23 I don't want to lose the thread, going back.

24 THE WITNESS: Sure.

25 JUDGE STRICKLER: Good morning, sir.

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1 THE WITNESS: Good morning.

2 JUDGE STRICKLER: You said that -- in
3 response to counsel's question a moment ago,
4 that every station would come up for renewal
5 over a period of time. And when they would,
6 you would review the station and you'd either
7 decide whether or not you wanted to drop it,
8 whether you wanted to keep it, or maybe be
9 tougher in negotiations because you thought you
10 had a better bargaining position.

11 What would make a station weaker such
12 that you would negotiate for -- you would
13 negotiate and seek lower -- to pay lower rates?

14 THE WITNESS: I think that if -- if
15 they had lost certain product. You know, I
16 could use general entertainment or sports. You
17 know, if they had a couple of big shows that
18 had been fan favorites or something, you know,
19 like a Mad Men or something or Walking Dead,
20 and they lost that programming, I think that
21 would make their leverage weaker. If they had
22 lost a major team, if they were a sports
23 network, that would clearly factor into our
24 evaluation.

25 It really came down to whether or

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<p>1 not -- again, we did a lot -- we tried to do a 2 lot of analysis as to how long can we be off 3 with this network and not suffer the 4 consequences of losing customers? 5 JUDGE STRICKLER: When you would 6 decide whether to negotiate to pay a lower rate 7 or to -- whether to drop the station, did you 8 look at whether or not people were actually 9 watching programs on the station? 10 THE WITNESS: I would do an initial 11 analysis. I think, like I said yesterday, I 12 would look back over historicals and just to 13 see -- just as they would come in and tout, you 14 know, they could slice and dice it any way they 15 wanted, their prime time on Tuesdays was up 16 20 percent or something, you know, I could walk 17 in and say: Well, overall, I think your 18 ratings are down a little bit here and there. 19 But in the end, you know, I think it 20 was kind of used as an initial -- you know, 21 initial tactic in kind of starting negotiations 22 and, you know, you kind of -- as we're all 23 gathering 50 pieces of information to go 24 negotiate with. But when push came to shove, 25 again, ratings didn't really -- we would look</p>	<p>1 were high. And you, in the negotiations, at 2 times would push back and say: Well, maybe 3 that's not really so. And then you'd point to 4 the negative ratings that they were trying to 5 obscure or not emphasize? 6 THE WITNESS: Yeah, I mean, I think 7 that -- again, I think both parties looked at 8 it like -- you know, again, it's much more 9 important to the network because that's where 10 they make a lot of their money, is advertising 11 sales. 12 I think we both -- like I said, it 13 would be, you know, one of 25 things you would 14 use in your arsenal. But, again, when push 15 came to shove, the last X number of weeks or so 16 and these negotiations got very intense, always 17 went down to the 11th hour, it really came down 18 to, you know, the value equation. And we would 19 look at what -- you know, again, what would it 20 cost us in losing subscribers to lose this 21 content and whether we were at a rate that 22 could justify paying them. 23 JUDGE STRICKLER: Can we put 24 Ms. Berlin's testimony back up on the screen 25 for a moment if possible.</p>
3200	3202
<p>1 much more at kind of how important that 2 programming was. And, again, to me it was just 3 how quickly our customers are going to leave 4 the platform. 5 JUDGE STRICKLER: In your answer you 6 mentioned in the beginning of the negotiations 7 you would talk to the station representatives 8 about, well, your prime times, is the 9 expression I think you used -- 10 THE WITNESS: Yeah. 11 JUDGE STRICKLER: -- your prime times 12 are up or prime times are down. By "prime 13 times," were you referring to your ratings in 14 prime time? 15 THE WITNESS: Oh, they -- so they 16 would come in and say -- you know, use AMC for 17 instance, they would come in and say, well -- 18 they would ignore, obviously, ratings that 19 didn't favor them, but they might come in and 20 say: Well, look, this program has -- it just 21 launched and it's now seeing, you know, 10 or 22 20 percent increases every year. Or -- 23 JUDGE STRICKLER: So they would try to 24 push that the station was valuable and the 25 programming was valuable because the ratings</p>	<p>1 MS. PLOVNICK: Sure. And, Dima, if 2 you could please put it up. 3 JUDGE STRICKLER: The part that you 4 were -- yeah, that's it. Thank you. I don't 5 know what paragraph we were in or page number 6 we were on there. 7 MS. PLOVNICK: For the record, this is 8 page 7 of Exhibit 6041. 9 JUDGE STRICKLER: I think that's the 10 wrong one. Stop scrolling. You're making me 11 motion sick. 12 (Laughter.) 13 JUDGE STRICKLER: Thank you. 14 In her testimony, she says at the end 15 of a paragraph, I can't tell which one it is, 16 on page 7 I think, she says -- that is 17 Ms. Berlin, right? -- "Based on my years of 18 experience in the subscription television 19 industry, I would say other satellite service 20 providers and cable operators all viewed 21 ratings as principal measure of value within a 22 defined genre of programming." 23 I want to focus on that last phrase 24 there, "within a defined genre of programming." 25 Did you understand that once you had identified</p>

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<p>1 a particular genre of programming that you 2 thought would round out the package of 3 programming in stations that you had, that you 4 would then be more -- at that point be more 5 interested than you were previously as to 6 ratings because once you know the genre you 7 want, you want a more popular version, a more 8 popular program within that genre? 9 THE WITNESS: Yeah, I'm trying to -- 10 so I think that, you know, maybe she's again 11 getting back to the early days of before we had 12 launched most -- you know, the local markets 13 and whether -- again, whether she was looking 14 at bringing in distant signals for maybe even 15 ethnic variety or devotional programming, 16 religious programming. 17 And all things being equal, okay, 18 there are two networks we can bring in, we only 19 have room for one, which one do we think is, 20 you know, you know -- you know, again, I can't 21 speak to kind of what -- the work she did back 22 in the early 2000s. You know, I'll say now 23 that there's not a lot of new channel launches, 24 other than regional sports networks. I think 25 you could look at the DirectTV platform over the</p>	<p>1 Q. Okay. You and Ms. Berlin both left 2 DirecTV in 2013; is that correct? 3 A. That's correct. 4 Q. Did you both leave for the same 5 reason? 6 A. No, I was burned out on the industry 7 so I took about a year and a half off and 8 traveled. I actually don't know the 9 circumstances behind hers. She left after I 10 did so I don't know the circumstances behind 11 her. 12 Q. She left after you did? 13 A. Yes. 14 Q. But in the same year? 15 A. Yes, I think that's right. 16 Q. So you both were at DirectTV from 1998 17 to 2013, the exact same years? 18 A. Yeah, I guess that's right. 19 Q. Okay. So let's talk a little bit 20 about the Bortz survey. I understand you 21 reviewed the Bortz survey for 2010 to 2013 -- 22 A. Yes, I did. 23 Q. -- for your testimony in this 24 proceeding? Have you ever participated in a 25 Bortz survey during your time as a satellite</p>
3204	3206
<p>1 last ten years and maybe there has been a 2 handful of non-sports networks launched. So 3 there's not a lot of -- you know, I think now 4 as, you know, the saturation of the market 5 happens not only with -- it has not only 6 happened with customers but with programming, I 7 think people basically are carrying everything 8 that's out there now. 9 JUDGE STRICKLER: She reported 10 directly to you over some period of time? 11 THE WITNESS: Yes, she did. 12 JUDGE STRICKLER: How many years? 13 THE WITNESS: Probably about five or 14 six years. 15 JUDGE STRICKLER: She was never 16 terminated by you or demoted by you? 17 THE WITNESS: No, no. 18 JUDGE STRICKLER: Never chastised for 19 being dishonest in any way by you? 20 THE WITNESS: No, not by me. No. 21 (Confidential session.) 22 // 23 (Return to open session.) 24 JUDGE STRICKLER: Thank you. 25 BY MS. PLOVNIK:</p>	<p>1 carrier? 2 A. In a Bortz survey, no. 3 Q. And do you know if Bortz surveys 4 satellite carriers? 5 A. I don't know that. 6 Q. All right. But you have never 7 participated -- because you're not a cable 8 operator, you've never participated in the 9 cable operator Bortz survey? 10 A. I have never participated in a Bortz 11 survey. 12 JUDGE STRICKLER: Have you 13 participated in any similar survey? 14 THE WITNESS: I would participate in 15 surveys that were -- not -- I wouldn't say 16 directly related to this survey or very similar 17 to this survey. I would participate in 18 surveys. A lot of time content companies would 19 kind of call around and survey all the 20 distributors anonymously, like a Disney or 21 Viacom, and ask about value of content and what 22 went into decision-making and other things, but 23 I did not participate in particular in a survey 24 that was very similar to this one, no. 25 JUDGE STRICKLER: Thank you.</p>

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<p style="text-align: right;">3207</p> <p>1 BY MS. PLOVNICK: 2 Q. All right. So let's turn to page 5 of 3 your direct testimony, which is Exhibit 1010. 4 And at the bottom of that page, you report the 5 point estimates from the Bortz report; is that 6 correct? 7 A. That's correct. 8 Q. And those are literally copied and 9 pasted from the Bortz report? 10 A. Yes, that's correct. 11 Q. So now, is it your testimony that 12 these results reflect the market value of the 13 different categories of programs from -- that 14 were retransmitted on distant signals between 15 2010 and 2013? 16 A. Yes, I think they're consistent with 17 -- with how I would value them. 18 Q. You say they're consistent with how 19 you would value them. Is that market -- 20 A. I mean, I could -- yes, they're 21 consistent. When I saw these numbers, I said, 22 you know, that just makes sense to me. It 23 seems consistent with how operator -- you know, 24 a MVPD executive would value these categories. 25 Q. So do you think that reflects the</p>	<p style="text-align: right;">3209</p> <p>1 Q. And I said would that be the market 2 that existed that cable operators were in when 3 they made these valuations in 2010 through 4 2013? I believe you said yes. 5 I And so I was saying -- asking you to 6 confirm that the market that existed between 7 2010 and 2013 was a regulated market, subject 8 to statutory licensing. 9 A. Well, but I do believe one of the 10 questions asked, you know, if you had to go out 11 and purchase this in the marketplace, what -- 12 you know, what are the values you would give. 13 Q. Oh. Well, why don't we take a look. 14 A. Okay. 15 Q. Let's look at the Bortz report, which 16 is Exhibit 1001. 17 A. I mean, they're asking about the 18 specific distant networks that were listed in 19 the questionnaire. 20 Q. Correct. And if you flip to the back, 21 there's a bunch of questionnaires, actually, in 22 the back of the Bortz report. But we can just 23 pick one. Let's see. 24 I'm looking at -- I'm going to just 25 look at Question 4a in one of those</p>
<p style="text-align: right;">3208</p> <p>1 market value of the programming categories or 2 your willingness to pay? 3 A. Well, no, I think it's the market -- 4 you know, I think the question was relative 5 value. And so I think that's -- 6 Q. Is relative value the same as market 7 value? 8 A. Relative value -- when I read the 9 questionnaire, I read it as when you're looking 10 at these categories of programming and you're 11 talking about distant signals, how -- you know, 12 what's the relative value of each category 13 versus the other category? 14 Q. And would you believe that to be 15 relative value within the market that existed 16 in 2010 through 2013? 17 A. Yeah, yes. 18 Q. So -- and that would be the regulated 19 market subject to the statutory licenses? 20 A. Well, I think that -- you're asking -- 21 wait, I'm sorry, what are you asking? 22 Q. I'm saying so in -- you're talking 23 here -- you say this is a relative valuation 24 for 2010 through 2013. 25 A. Um-hum.</p>	<p style="text-align: right;">3210</p> <p>1 questionnaires. So let me find one to point 2 you to. I'm looking at -- well, I think the 3 one they put up on the screen is C-14. We can 4 use the one that's on the screen just to make 5 it fast and easy for everybody here. 6 Actually, this is a WGNA-only one, so 7 we want one that's not WGNA-only, in case the 8 language is different, because most of the -- 9 would you agree that there are more WGNA 10 systems that are not just WGNA-only than 11 WGNA-only systems? 12 A. I'm sorry, WGNA carrying -- 13 Q. Carrying WGNA as one of multiple 14 signals, rather than being a WGNA-only system. 15 Would you agree that there are more cable 16 systems that carry multiple signals, rather 17 than just WGNA-only? 18 A. Oh, I didn't look at all the -- 19 Q. You didn't -- 20 A. -- statement of accounts for cable -- 21 Q. Okay. 22 A. -- so I can't speak to that. 23 Q. Okay. Well, let's just -- how about 24 -- let's look at B-20. 25 A. Okay.</p>

3211	3213
<p>1 Q. That's the one that's on here. So</p> <p>2 this is Question 4a from the Bortz survey.</p> <p>3 MR. CANTOR: Excuse me. Could you</p> <p>4 just make available for him the full version of</p> <p>5 the survey that you're talking about?</p> <p>6 MS. PLOVNICK: Sure. I've got it</p> <p>7 right here, actually, if I may approach the</p> <p>8 witness. I think it's probably also in one of</p> <p>9 the mini-binders over there. May I approach?</p> <p>10 JUDGE BARNETT: You may.</p> <p>11 BY MS. PLOVNICK:</p> <p>12 Q. All right. This is a copy of</p> <p>13 Exhibit 1001, in case you would like to look at</p> <p>14 any other page of it. But I'm really simply</p> <p>15 looking at Question 4a, so that you can</p> <p>16 understand what the language was because I</p> <p>17 think that you were trying to remember it off</p> <p>18 the top of your head.</p> <p>19 So in Question 4a, it says, "Now, I</p> <p>20 would like you to estimate the relative value</p> <p>21 to your cable system of each category of</p> <p>22 programming actually broadcast by the stations</p> <p>23 I mentioned during" -- and they say the year --</p> <p>24 "excluding any national network programming</p> <p>25 from ABC, CBS, and NBC."</p>	<p>1 experience in negotiating for types of content</p> <p>2 would help me evaluate the types of content</p> <p>3 that were on these distant signals.</p> <p>4 Q. So you're saying that you wouldn't be</p> <p>5 limiting it to distant signals, if you were to</p> <p>6 be asked this question?</p> <p>7 A. Well, no. I would look at what</p> <p>8 programming was on the distant signal and I</p> <p>9 would say, you know, clearly that if I was</p> <p>10 bringing the distant signal in, I'm assuming it</p> <p>11 was because of a certain type of programming on</p> <p>12 that signal that I was looking for something --</p> <p>13 there's a reason I'm bringing that distant</p> <p>14 signal in.</p> <p>15 And so I would -- you know, so I would</p> <p>16 look at whatever the signals were and -- you</p> <p>17 know, and figure out, okay, well, how important</p> <p>18 was that type of programming for me to bring in</p> <p>19 on this distant signal.</p> <p>20 Q. So you would limit it to the signals;</p> <p>21 you wouldn't be considering other kinds of</p> <p>22 programming?</p> <p>23 A. Well, I think you would look, I</p> <p>24 guess -- you know, I would look at what the</p> <p>25 content that was on the distant signal. Again,</p>
3212	3214
<p>1 A. I'm sorry, let me -- okay, I'll look</p> <p>2 here. I'm in the WGNA one.</p> <p>3 Q. I think we're on page B-20. That's in</p> <p>4 the back in the appendices.</p> <p>5 A. Okay.</p> <p>6 Q. It says "relative value to your cable</p> <p>7 system of each category of programming actually</p> <p>8 broadcast by the stations I mentioned during"</p> <p>9 -- and this one it says 2013 -- "excluding any</p> <p>10 national network programming from ABC, CBS, and</p> <p>11 NBC."</p> <p>12 A. Um-hum.</p> <p>13 Q. So my question is, is this the --</p> <p>14 asking for a relative valuation based on the</p> <p>15 market as it existed in 2010 through 2013,</p> <p>16 which would be the regulated market?</p> <p>17 A. Well, I think that, yeah, I mean, it's</p> <p>18 asking you to value the programming on --</p> <p>19 again, on the stations they were carried, the</p> <p>20 distant signals, correct? But I think that --</p> <p>21 Q. The distant signals that were carried?</p> <p>22 A. Yes. But I think that -- and so I</p> <p>23 think you're talking about specifically with</p> <p>24 respect to the program that's on these distant</p> <p>25 signals, but I think your -- you know, my</p>	<p>1 I'm bringing it in for a reason, so -- and</p> <p>2 then --</p> <p>3 Q. And is it your testimony you would</p> <p>4 consider other factors outside of distant</p> <p>5 signals? Or that you would limit your</p> <p>6 consideration to the value of the programming</p> <p>7 on the distant signals?</p> <p>8 A. Well, I'm looking at the distant</p> <p>9 signals. So I'm evaluating the content that's</p> <p>10 on the distant signals.</p> <p>11 Q. So you would evaluate the content on</p> <p>12 the distant signals and you would limit your</p> <p>13 consideration to the value of the content on</p> <p>14 the distant signals?</p> <p>15 A. Yes, that's correct, although, like I</p> <p>16 said, at some point, you know, you do know the</p> <p>17 value of content because of all the -- you</p> <p>18 know, you're a professional in the industry.</p> <p>19 Q. And you would be -- you would, just to</p> <p>20 bring it -- just to clarify what you were</p> <p>21 saying, so you would be focused on the content</p> <p>22 on the distant signals that you were carrying</p> <p>23 subject to the statutory license in the</p> <p>24 relevant royalty years as considering Question</p> <p>25 4a?</p>

<p style="text-align: right;">3215</p> <p>1 A. The survey to me was asking what --</p> <p>2 I'm reading -- I'm looking at the distant</p> <p>3 signals that I carry. And what is the -- you</p> <p>4 know, obviously like I said, if I have a fixed</p> <p>5 dollar amount to spend, a budget to spend, to</p> <p>6 acquire the non-network programming on those,</p> <p>7 you know, on that -- on the programming that's</p> <p>8 on these distant signals -- this, I think, asks</p> <p>9 for a percentage, right, the percentage of the</p> <p>10 fixed dollar amount -- so I've got a fixed</p> <p>11 dollar amount. How much am I going to allocate</p> <p>12 to sports?</p> <p>13 So I would look at the stations that</p> <p>14 I've carried and say, okay, well, you know,</p> <p>15 given these, I think that, you know, X percent</p> <p>16 is a fair value. That's what I would value,</p> <p>17 the relative value of sports versus the other</p> <p>18 content that would be appearing on these</p> <p>19 distant signals.</p> <p>20 JUDGE STRICKLER: When you would make</p> <p>21 that analysis as you're going through that in</p> <p>22 your answer, would you consider how much in the</p> <p>23 way of sports you already have in your line-up</p> <p>24 on other channels and say, for example -- I'm</p> <p>25 not saying this is the case, but</p>	<p style="text-align: right;">3217</p> <p>1 signals without permission into a launched</p> <p>2 market where satellite can't.</p> <p>3 And so I think they may have made a</p> <p>4 determination for bringing, say, a Fox station</p> <p>5 in that I can get a regional game that's not</p> <p>6 available in my local Fox or something. So,</p> <p>7 you know, if you're bringing in a distant</p> <p>8 station from a neighboring market and it has</p> <p>9 got the same sports, maybe the value isn't</p> <p>10 there, because you're seeing the exact same</p> <p>11 programming, I will say for something like WGN,</p> <p>12 we really did see -- you know, we launched the</p> <p>13 WGNA before we launched the Tribune stations.</p> <p>14 We saw value. We kept that because we saw the</p> <p>15 value.</p> <p>16 JUDGE STRICKLER: If you were</p> <p>17 answering this survey, would you -- given how</p> <p>18 important sports is in terms of subscribership,</p> <p>19 would you give 100 percent to sports and zero</p> <p>20 to the other categories?</p> <p>21 THE WITNESS: No, because I think that</p> <p>22 you -- you know, I think, again, when you're</p> <p>23 looking at the -- and, again, satellite does</p> <p>24 work differently, but I imagine as a cable</p> <p>25 operator if you're looking at the six different</p>
<p style="text-align: right;">3216</p> <p>1 hypothetically -- well, we've already -- we</p> <p>2 think we've exhausted the sports enthusiast who</p> <p>3 is going to subscribe, so sports, while it may</p> <p>4 be the biggest overall driver of what we have,</p> <p>5 we've so successfully tapped into that market</p> <p>6 that we don't need to tap -- you know, getting</p> <p>7 the Cubs, the White Sox, and the Bulls, three</p> <p>8 out-of-market teams on a distant</p> <p>9 retransmitted station is not that big a deal.</p> <p>10 So sports on the margin now, now that</p> <p>11 we're -- that you're looking at a distant</p> <p>12 retransmitted station, isn't as big a driver as</p> <p>13 it otherwise would be when you're first</p> <p>14 creating your overall line-up of stations and</p> <p>15 networks?</p> <p>16 THE WITNESS: I guess, you know, I</p> <p>17 think that -- I guess if you use WGNA as an</p> <p>18 example, we saw -- you know, DirecTV clearly</p> <p>19 saw value in live team sports programming,</p> <p>20 locally, nationally. You know, ESPN is a</p> <p>21 national sports network.</p> <p>22 I don't think -- you know, it's --</p> <p>23 satellite and cable do work differently as far</p> <p>24 as how they can import distant signals. And so</p> <p>25 as I understand it, cable can bring in distant</p>	<p style="text-align: right;">3218</p> <p>1 stations you're carrying or whatever, you're --</p> <p>2 again, you're bringing those distant in for a</p> <p>3 reason. So there's a type of programming on</p> <p>4 there or whether it's, you know, a newscast or</p> <p>5 some other type of local programming or sports</p> <p>6 or something else that you find valuable.</p> <p>7 But --</p> <p>8 JUDGE STRICKLER: So there does come,</p> <p>9 if you will, a saturation point even with</p> <p>10 regard to the distantly retransmitted stations,</p> <p>11 where you say enough with the sports already,</p> <p>12 we can do better by having some other</p> <p>13 programming type. Sports may be 50, 60,</p> <p>14 70 percent, whatever number you might choose as</p> <p>15 the percent in this constant sum survey, but at</p> <p>16 some point you're going to say that's enough,</p> <p>17 let's move into some other niche or programming</p> <p>18 category that will better serve our bottom</p> <p>19 line?</p> <p>20 THE WITNESS: I mean, I think you</p> <p>21 could say that probably with the general market</p> <p>22 and I assume distant signals as well, that you</p> <p>23 want to serve as many customers, as many bases,</p> <p>24 your whole customer base. And that would</p> <p>25 include trying to provide as much content as</p>

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<p>3219</p> <p>1 you can from all genres.</p> <p>2 JUDGE STRICKLER: Which goes back to</p> <p>3 my first question. So if you already had a</p> <p>4 channel and station network line-up before you</p> <p>5 started looking at the distantly retransmitted</p> <p>6 stations, you would on the margin add sports or</p> <p>7 not add sports in part based on how much you</p> <p>8 had in the way of sports already; isn't that a</p> <p>9 fair statement?</p> <p>10 THE WITNESS: I guess if you're</p> <p>11 looking at -- I guess I separate out</p> <p>12 super-stations and local -- and distant, you</p> <p>13 know, distant stations and bringing in a</p> <p>14 neighboring signal from another market.</p> <p>15 And like I said, I guess -- you know,</p> <p>16 if your question is would I see value in</p> <p>17 bringing in a distant Fox if I've already got</p> <p>18 the Fox and it has got all the same programming</p> <p>19 on it, you know, I'm not getting a different</p> <p>20 game of sports, yeah, maybe I don't know that I</p> <p>21 would see the value there, but I think -- I'm</p> <p>22 sorry if I'm not --</p> <p>23 JUDGE STRICKLER: No, you're</p> <p>24 answering.</p> <p>25 THE WITNESS: Okay.</p>	<p>3221</p> <p>1 -- that serve a local audience.</p> <p>2 But there are a number of teams that I</p> <p>3 would be interested in bringing nationally, if</p> <p>4 I could, that just the rights don't allow you</p> <p>5 to do that. The Cubs, you know, WGNA, because</p> <p>6 of the super-station, we were allowed to serve</p> <p>7 an entire national audience and that was</p> <p>8 important to us. I'm not saying everybody is a</p> <p>9 Cubs fan, but for the rate they were paying --</p> <p>10 JUDGE BARNETT: They're not?</p> <p>11 (Laughter.)</p> <p>12 THE WITNESS: I grew up in Pittsburgh</p> <p>13 so --</p> <p>14 JUDGE STRICKLER: You can be an</p> <p>15 anti-fan too and hate the team and hope to</p> <p>16 watch them lose.</p> <p>17 THE WITNESS: Well, true, true. No,</p> <p>18 but I do think you also get a -- you know,</p> <p>19 there's certainly a level of fan that --</p> <p>20 nationally that want to see all the games.</p> <p>21 There's also a level of fan that just will</p> <p>22 watch a national game if it's on. Maybe a more</p> <p>23 casual sports fan.</p> <p>24 But, you know, specifically with</p> <p>25 respect to super-stations, no, I mean, I will</p>
<p>3220</p> <p>1 JUDGE STRICKLER: But what if it's --</p> <p>2 what if it's a different team? I mean, in the</p> <p>3 local market, if it was the New York market,</p> <p>4 say you already had the Knicks and the Nets, so</p> <p>5 you had basketball and you had other basketball</p> <p>6 on the super-stations.</p> <p>7 THE WITNESS: Um-hum.</p> <p>8 JUDGE STRICKLER: Would that -- would</p> <p>9 you consider whether or not there would be</p> <p>10 sufficient value added by importing a station</p> <p>11 because it had the Chicago Bulls?</p> <p>12 THE WITNESS: Yes, I would --</p> <p>13 JUDGE STRICKLER: When that market</p> <p>14 already had a lot of basketball?</p> <p>15 THE WITNESS: Oh, no, because I don't</p> <p>16 think -- no, I actually -- I think I understand</p> <p>17 your question now. I think that I guess, you</p> <p>18 know, when you talk about -- you know, I know</p> <p>19 at some point you talk about the passion of the</p> <p>20 fans.</p> <p>21 I think you've got, you know, a large</p> <p>22 base of sports fans that are pretty passionate.</p> <p>23 And they'll watch, you know, sports when it's</p> <p>24 on. That's why ESPN has Sports Center. And</p> <p>25 then you clearly have your local teams that are</p>	<p>3222</p> <p>1 tell you I was involved in the decision, we saw</p> <p>2 the value of every time it came up for renewal.</p> <p>3 JUDGE STRICKLER: Thank you.</p> <p>4 BY MS. PLOVNICK:</p> <p>5 Q. So in the course of your answers to</p> <p>6 Judge Strickler's questions, you said "I</p> <p>7 assume," "I imagine." And this is because</p> <p>8 you're not actually a cable operator, correct,</p> <p>9 so you're having to make assumptions about what</p> <p>10 cable operators would do in this context?</p> <p>11 Because your experience is --</p> <p>12 A. I mean, I know a lot of folks in the</p> <p>13 cable industry, so we speak about matters, but</p> <p>14 I have never worked for a cable company.</p> <p>15 Q. You never worked for a cable company.</p> <p>16 You never responded to the Bortz survey?</p> <p>17 A. That is correct.</p> <p>18 Q. And so when you were answering some</p> <p>19 questions on direct about Dr. Steckel and his</p> <p>20 critique of the categories that are used in the</p> <p>21 Bortz survey, and you said that you disagreed</p> <p>22 with him that they would be confusing to cable</p> <p>23 operators, this is based on your experience in</p> <p>24 the satellite industry, not based on having</p> <p>25 ever worked in the cable industry as a cable</p>

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<p>1 operator?</p> <p>2 A. It's my experience as an MVPD</p> <p>3 executive, which I think covers both. We go</p> <p>4 through the same analysis with respect to</p> <p>5 programming and --</p> <p>6 Q. That's your assumption based on your</p> <p>7 satellite experience, not based on ever having</p> <p>8 worked in the cable industry?</p> <p>9 A. But based on knowing every -- all my</p> <p>10 competitors and the folks that have my job at</p> <p>11 all the major competitors, cable companies.</p> <p>12 I --</p> <p>13 Q. You're making assumptions about what</p> <p>14 they would think or how they would answer these</p> <p>15 questions?</p> <p>16 A. I -- I -- from having -- obviously</p> <p>17 from knowing a lot of people in the industry</p> <p>18 and having conversations over the 15 years, I</p> <p>19 know the importance of these categories of</p> <p>20 programming to an executive.</p> <p>21 Q. Based on --</p> <p>22 A. But I cannot -- you're right.</p> <p>23 Q. But you cannot speak for them or what</p> <p>24 goes on in their minds or how they may or may</p> <p>25 not have understood this?</p>	<p>1 testimony.</p> <p>2 A. Okay.</p> <p>3 Q. So they put up on the screen 6002,</p> <p>4 which is Mr. Mansell's testimony.</p> <p>5 A. Okay.</p> <p>6 Q. That's what he says?</p> <p>7 A. I've analyzed -- you're talking about</p> <p>8 the first full paragraph?</p> <p>9 Q. Yes.</p> <p>10 A. Yes, that's what he says.</p> <p>11 Q. All right. And so you testified</p> <p>12 earlier this morning that you agreed with a lot</p> <p>13 of what Mr. Mansell says about the emergence of</p> <p>14 regional sports networks and changes in the</p> <p>15 industry over the 30 years that he analyzed?</p> <p>16 A. That's -- I did agree with his</p> <p>17 testimony that there have been more and more</p> <p>18 regional sports networks launching over the</p> <p>19 last 15 or 20 years, yes.</p> <p>20 Q. Now, in your rebuttal testimony, you</p> <p>21 did an analysis focused on comparing the time</p> <p>22 period 2004 to 2005 and 2010 through 2013, and</p> <p>23 you just looked at changes over that period of</p> <p>24 time; is that correct?</p> <p>25 A. Are you talking about the charts with</p>
3224	3226
<p>1 A. That is -- yes, you are correct.</p> <p>2 Q. Having never responded yourself. All</p> <p>3 right.</p> <p>4 Let's talk just for a minute about the</p> <p>5 part of your rebuttal testimony that responds</p> <p>6 to Mr. Mansell. And so now your rebuttal</p> <p>7 testimony for the record is Allocation Hearing</p> <p>8 Exhibit 1011. And the part of your rebuttal</p> <p>9 testimony where you respond to Mr. Mansell I</p> <p>10 think is pages 5 to 6; is that correct?</p> <p>11 And now, Mr. Mansell's testimony is</p> <p>12 Exhibit 6002. And we can pull it up and look</p> <p>13 at it if you need to, Mr. Hartman, but I'll</p> <p>14 represent to you -- and you can tell me if I'm</p> <p>15 characterizing this correctly -- that</p> <p>16 Mr. Mansell analyzed programming trends for JSC</p> <p>17 programming over 30 years, and he concludes</p> <p>18 that the number of professional live college</p> <p>19 team sports games on local over-the-air</p> <p>20 stations has significantly declined over that</p> <p>21 time; while the number of games available</p> <p>22 through other outlets, such as cable networks,</p> <p>23 has increased. Oh, it looks like they already</p> <p>24 put it up here.</p> <p>25 So that's what Mr. Mansell says in his</p>	<p>1 respect to the carriage for --</p> <p>2 Q. Yes, I'm talking about the charts on</p> <p>3 page 5, 6, and 7 of your testimony.</p> <p>4 A. Okay.</p> <p>5 Q. Well -- and actually, if we look at</p> <p>6 the first one, Table 1 -- and it's on page 5, I</p> <p>7 think that's what on the screen right now --</p> <p>8 this is actually you reporting an analysis that</p> <p>9 someone else did, right? This is an analysis</p> <p>10 that Dr. Israel did?</p> <p>11 A. Yeah, that's correct.</p> <p>12 Q. And Dr. Israel actually was just</p> <p>13 reporting some numbers that other folks had</p> <p>14 actually calculated; Mr. Ducey and</p> <p>15 Dr. Crawford; is that correct?</p> <p>16 A. That's correct.</p> <p>17 Q. So do you know how Dr. Israel put this</p> <p>18 table together?</p> <p>19 A. Well, no, I know he reviewed the</p> <p>20 testimony of Ducey and Crawford, but, no, I</p> <p>21 took -- I trusted Dr. Israel as in his</p> <p>22 position.</p> <p>23 Q. And Dr. Israel said -- in your title</p> <p>24 you say that this is weighted by subscribers.</p> <p>25 Do you know if it's subscribers or subscriber</p>

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<p>1 instances?</p> <p>2 A. For which one? I'm sorry.</p> <p>3 Q. The title to Table 1. It says Share</p> <p>4 of Compensable Minutes by Claimant Group</p> <p>5 Weighted by Subscribers.</p> <p>6 Do you know if the weighting was done</p> <p>7 by subscribers or subscriber instances? Or do</p> <p>8 you even know what a subscriber instance --</p> <p>9 A. Sorry, you're talking about subscriber</p> <p>10 instances, people watching the number of --</p> <p>11 Q. Right. Do you believe which it is?</p> <p>12 A. Yeah, I don't.</p> <p>13 Q. And did you analyze what Dr. Israel or</p> <p>14 Mr. Ducey or Dr. Crawford relied on to come up</p> <p>15 with these numbers?</p> <p>16 A. No, I did not.</p> <p>17 Q. All right. You just took them</p> <p>18 verbatim as reported by Dr. Israel; is that</p> <p>19 correct?</p> <p>20 A. I read Dr. Israel's testimony and,</p> <p>21 yes, I trusted Dr. Israel.</p> <p>22 Q. And same for moving over here to page</p> <p>23 6, 7, you have here some tables reporting JSC</p> <p>24 telecasts on WGNA, Fox, and, carrying on into</p> <p>25 page 7, these are Major League Baseball</p>	<p>1 A. I -- no, it does not appear that he</p> <p>2 did. But, again, I think when you're looking</p> <p>3 at -- for purposes of this hearing and what's</p> <p>4 being compensated on, I think that these were</p> <p>5 the important numbers to focus on.</p> <p>6 Q. So you think that the Judges should</p> <p>7 disregard all of the other distantly broadcast</p> <p>8 stations out there that aren't Fox or WGNA?</p> <p>9 A. Well, I don't know that -- you know,</p> <p>10 without having seen all the -- I'm not sure how</p> <p>11 many distant signals were carried that were</p> <p>12 carrying sports at the time amongst --</p> <p>13 Q. A lot more than Fox and WGNA. Let me</p> <p>14 represent that to you. Do you trust that</p> <p>15 representation?</p> <p>16 A. I would have to look at the numbers.</p> <p>17 Q. All right. Well, do you know how much</p> <p>18 compensable programming was aired on WGNA?</p> <p>19 A. Oh, it's mostly the sports. There</p> <p>20 were some other programming, programs that were</p> <p>21 compensable for WGNA.</p> <p>22 Q. But it's a small number of minutes</p> <p>23 total that are compensable on WGNA; is that</p> <p>24 correct?</p> <p>25 A. For which category? For which --</p>
3228	3230
<p>1 telecasts on Fox, NFL telecasts on Fox.</p> <p>2 These tables say underneath source,</p> <p>3 Bortz Media compilation. Did you rely on</p> <p>4 Mr. Trautman at Bortz to prepare these tables?</p> <p>5 A. Well, he sent me the -- I got backup</p> <p>6 with respect to these game numbers.</p> <p>7 Q. So you actually reviewed the backup --</p> <p>8 A. Yes.</p> <p>9 Q. -- underlying these tables?</p> <p>10 A. Yes, I did.</p> <p>11 Q. And you focused, in those tables,</p> <p>12 solely on WGNA and Fox, correct?</p> <p>13 A. Yes, that's correct.</p> <p>14 Q. You did not look at all other</p> <p>15 stations?</p> <p>16 A. I -- no, I think these were the --</p> <p>17 when you look at, certainly with WGNA, it was,</p> <p>18 you know, by far, I think, but certainly with</p> <p>19 satellite and cable, the biggest revenue</p> <p>20 source, I guess, for -- going into the</p> <p>21 Copyright Office.</p> <p>22 But if you're asking whether we looked</p> <p>23 at 500 stations, not to my knowledge.</p> <p>24 Q. But Mr. Mansell did not limit his</p> <p>25 analysis to WGNA and Fox, did he?</p>	<p>1 Q. For all categories. The vast majority</p> <p>2 of the programming on WGNA is not compensable</p> <p>3 in these proceedings. Is that correct?</p> <p>4 A. With -- I have not reviewed that</p> <p>5 material, but I know that a good portion of the</p> <p>6 programming was not compensable but the sports</p> <p>7 is what was compensable.</p> <p>8 Q. But you haven't reviewed that</p> <p>9 information about what was compensable and what</p> <p>10 wasn't compensable on WGNA?</p> <p>11 A. Well, I've seen -- yes, it has been a</p> <p>12 while since I reviewed it, but I did review it,</p> <p>13 yes.</p> <p>14 Q. You reviewed it, but you don't recall?</p> <p>15 A. I can't cite it to you.</p> <p>16 Q. But you know it's a small amount?</p> <p>17 A. I know that -- but I don't think for</p> <p>18 purposes of this hearing, I guess, I'm not sure</p> <p>19 what -- you know, the sports was compensable,</p> <p>20 and I think that's what's the important part.</p> <p>21 Q. Well, sports is not the only category</p> <p>22 at issue in this proceeding, is it?</p> <p>23 A. No, it's not.</p> <p>24 Q. Yeah. So the other signals and the</p> <p>25 other categories of programming are also</p>

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<p>1 important to the Judges in their consideration, 2 are they not?</p> <p>3 A. I'm sure they're looking at all the 4 stations, yes. And I guess if I could just say 5 one thing. I'm not sure for the period we're 6 talking about here that -- without seeing your 7 analysis, I'm not sure if the period 2010 8 through 2013 we're talking about here, I don't 9 know how many local stations we were talking 10 about that may have lost sports.</p> <p>11 Q. May have launched sports?</p> <p>12 A. Lost, lost.</p> <p>13 Q. Lost sports?</p> <p>14 A. Yes, lost. When he's doing his 15 analysis here, you know, I was really focusing 16 on the prior period and then the current period 17 that we're --</p> <p>18 Q. You were focused on the '04-'05 period 19 versus the 2010 --</p> <p>20 A. Well, the -- right, and the 2010 being 21 obviously the most important period.</p> <p>22 Q. You didn't consider the entire period 23 that Mr. Mansell considered or all the stations 24 he considered?</p> <p>25 A. Well, I considered -- my point was</p>	<p>1 other follow-up question just coming back to 2 the Bortz survey question very quickly.</p> <p>3 Did you -- when you were asking -- the 4 hypothetical questions that Judge Strickler was 5 asking you about how you would have answered 6 Question 4a, what volume of programming, if 7 any, would you have had in mind in considering 8 those questions? If you were responding to the 9 Bortz survey and you were considering distant 10 signals and the different bundling type issues 11 that Judge Strickler was asking you about?</p> <p>12 A. I'm sorry, I don't -- what do you mean 13 by volume?</p> <p>14 Q. Would you have had any particular 15 volume of programming in mind when you were 16 evaluating and assigning value to the different 17 categories of programming?</p> <p>18 A. Meaning would I -- if there was 100 19 hours of sports versus two hours of --</p> <p>20 Q. Would you know any particular volume 21 or would you have had any particular volume in 22 mind for any particular category?</p> <p>23 A. Well, I'm sorry, I was really having 24 trouble. You know, you're looking at the -- 25 would I know every program that was on there</p>
3232	3234
<p>1 that we're talking about the 2010 through 2013 2 period here for compensable purposes, so I 3 don't know. I don't have an analysis of how 4 many local stations lost sports during that 5 period.</p> <p>6 Q. During 2010 through 2013?</p> <p>7 A. Yes, which I think would be relevant.</p> <p>8 Q. One more follow-up -- actually a 9 couple more follow-up questions.</p> <p>10 In your testimony just in general, and 11 this is switching gears a bit, you mentioned 12 some -- HBO, ESPN, Disney, USA, different 13 things. These are all cable networks; is that 14 correct?</p> <p>15 A. Yes, the ones you mentioned?</p> <p>16 Q. Yes.</p> <p>17 A. Yes.</p> <p>18 Q. And the ones that -- I'm trying to 19 remember all the ones you said.</p> <p>20 A. Yes, yes.</p> <p>21 Q. Those are cable networks and they are 22 not distant broadcast signals?</p> <p>23 A. They are not distant broadcast 24 signals.</p> <p>25 Q. Or local broadcast signals. And one</p>	<p>1 and what -- every program and what category it 2 fit into for every signal?</p> <p>3 Q. I guess that's -- that's one way to 4 look at my question. Would you be thinking 5 about every one of the individual programs in 6 all of the signals or how much total those 7 comprise?</p> <p>8 A. I guess I would look at -- you know, 9 again, you're bringing in a distant signal 10 because there's certain programming on that 11 signal that's important to you. So I would not 12 know every program that was on, I don't think, 13 that was on every distant signal that I 14 carried.</p> <p>15 But if I'm importing something, I'm 16 probably importing it for a reason, so I would 17 probably know that -- kind of what was 18 important to me on that signal.</p> <p>19 Q. And so you said you wouldn't know 20 every program. And you probably wouldn't know 21 the minutes of programming that they totalled, 22 how many minutes of each category of 23 programming?</p> <p>24 A. I don't think anybody would know that 25 but -- yes.</p>

<p style="text-align: right;">3235</p> <p>1 Q. All right. Thank you.</p> <p>2 MS. PLOVNICK: I have no further</p> <p>3 questions, Your Honor.</p> <p>4 JUDGE BARNETT: Thank you.</p> <p>5 Mr. MacLean?</p> <p>6 MR. MacLEAN: Thank you, Your Honor.</p> <p>7 CROSS-EXAMINATION</p> <p>8 BY MR. MacLEAN:</p> <p>9 Q. Good morning, Mr. Hartman.</p> <p>10 A. Good morning.</p> <p>11 Q. I'm Matthew MacLean. I represent the</p> <p>12 Settling Devotional Claimants.</p> <p>13 A. Okay.</p> <p>14 Q. I first want to ask something about --</p> <p>15 about something you said about network</p> <p>16 programming and your decision to retransmit</p> <p>17 network programming. And I believe you said</p> <p>18 that, aside from WGN, this was some of the</p> <p>19 programming that you retransmitted</p> <p>20 predominantly?</p> <p>21 A. On a distant network basis?</p> <p>22 Q. Yes.</p> <p>23 A. Yes.</p> <p>24 Q. Could you explain why you would have</p> <p>25 retransmitted network programming on a distant</p>	<p style="text-align: right;">3237</p> <p>1 understand it.</p> <p>2 Q. And when you say prime time</p> <p>3 programming, you're referring to basically</p> <p>4 nationwide network programming?</p> <p>5 A. Network -- the programming that comes</p> <p>6 from the corporate level network, yes.</p> <p>7 Q. In what kinds of markets would you be</p> <p>8 retransmitting network programming on a distant</p> <p>9 basis?</p> <p>10 A. So I guess, like I was saying -- and</p> <p>11 this is more in the early days because DirecTV</p> <p>12 has launched pretty much every market now and</p> <p>13 has for -- has been in most markets for at</p> <p>14 least several years, probably eight or ten.</p> <p>15 So if there was a market that DirecTV</p> <p>16 had not launched yet, you know, pick a number,</p> <p>17 200 markets, Burlingame, Iowa, or something, if</p> <p>18 it did not have the capacity to launch, you</p> <p>19 know -- just briefly, I don't know if you know,</p> <p>20 with satellite it's launch one, launch all. So</p> <p>21 if we launch a local station in a market, we've</p> <p>22 got to launch all local stations under either</p> <p>23 must-carry or retrans. So, obviously, we had</p> <p>24 to be very careful about which markets we</p> <p>25 launched because we were a satellite company,</p>
<p style="text-align: right;">3236</p> <p>1 network basis?</p> <p>2 A. Oh, I'm sorry if I was speaking more</p> <p>3 -- if I was misspeaking. What I meant was when</p> <p>4 you looked at -- again, when you look through</p> <p>5 other statement of accounts, the DirecTV</p> <p>6 statement of accounts for the period we're</p> <p>7 talking about here, and when it lists the</p> <p>8 stations that we're paying on, you know, like I</p> <p>9 said, WGN is obviously this huge tranche of</p> <p>10 75 percent, and then you have, I guess I should</p> <p>11 say network affiliated stations.</p> <p>12 Q. Sure.</p> <p>13 A. Maybe that's -- you know, so when we</p> <p>14 were -- at the time when DirecTV was trying to</p> <p>15 figure out how best to service our customers,</p> <p>16 before we could launch every market, it was</p> <p>17 important to have the -- what I would call the</p> <p>18 big four broadcast networks in market, whether</p> <p>19 it was an out-of-market signal or not, network</p> <p>20 affiliates, because it carried the sports</p> <p>21 programming, the prime time programming that</p> <p>22 were important to customers.</p> <p>23 I guess that's what I was getting at.</p> <p>24 And that's the whole -- you know, that's the</p> <p>25 vast majority of what we paid on, as I</p>	<p style="text-align: right;">3238</p> <p>1 we were using spot beam technology, which is</p> <p>2 just very difficult to figure out and get, you</p> <p>3 know, the number of stations you need into a</p> <p>4 local market on a national -- using a national</p> <p>5 satellite.</p> <p>6 But, anyway, so the point would be</p> <p>7 that when we were launching -- we were looking</p> <p>8 at different markets and we were allowed to</p> <p>9 bring in a distant signal, again, what was most</p> <p>10 important to us were affiliates of the -- of</p> <p>11 the big four broadcast networks.</p> <p>12 So that initially I think was the New</p> <p>13 York ABC, NBC, CBS, and Fox, and L.A. NBC, CBS,</p> <p>14 ABC, and Fox.</p> <p>15 Q. And that's because in a particular</p> <p>16 market, if it didn't have its own local network</p> <p>17 affiliate station, you would want to import a</p> <p>18 station so that you'd have that network</p> <p>19 programming?</p> <p>20 A. No, there were two -- I guess you</p> <p>21 could look at it -- again, it was so difficult,</p> <p>22 sorry if it's kind of confusing, but because we</p> <p>23 had used -- you know, cable is already</p> <p>24 entrenched. They could launch every market.</p> <p>25 They have a cable plant that you can just flip</p>

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<p>1 a switch and you can launch 20 local channels. 2 Because DirecTV had to take its national 3 satellite capacity and try to figure out how to 4 get -- to launch, you know, 5 different 5 stations in this town, 20 different stations in 6 this town, it was a very slow roll-out process. 7 So there was no decision -- once we 8 launched a market, there was no decision; it 9 was we launched every channel, every local 10 station, excuse me, but until we launched a 11 market, in order to be competitive, it was most 12 important for us to carry -- again, these were 13 markets we hadn't launched any local station 14 yet, to carry affiliates of the big four 15 broadcast networks. 16 Q. Are there local markets that don't 17 have all four big four? 18 A. Yes. 19 Q. And in those markets that don't have 20 all four big four networks, is it important to 21 import a network channel? 22 A. Yes, to distantly import a -- yes. 23 You mean a Fox or an ABC? Yes. 24 Q. And in a DMA or in a market like that, 25 that doesn't have its own local ABC, NBC, CBS</p>	<p>1 small market. 2 Q. Do markets like that tend to have 3 lower subscription fees on average? 4 A. No. 5 Q. Across the country? 6 A. No. I mean, our pricing, it's pretty 7 much -- except for some of the access fees, 8 it's pretty much national pricing that DirecTV 9 has. So, no -- 10 Q. For DirecTV, it's national? 11 A. Yes, yes. So the fee, what you would 12 pay in a smaller market -- and there was 13 another reason too, because you wanted to -- if 14 your customer is paying the same price, you 15 really would like them to have the same 16 programming that everybody across the country 17 has. 18 Q. Shifting gears a little bit here, I'd 19 like to take a look at page 7 of your written 20 direct testimony. Focusing on paragraph 24, 21 you say you've reviewed the written testimony 22 from the 2004-2005 proceedings of Judith Meyka? 23 A. Um-hum. 24 Q. And that she testified as to the 25 importance of live sports programming to a</p>
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<p>1 station, is it -- is there value in importing 2 the network programming into that market? 3 A. So if there's a market that only has 4 three of the big four? 5 Q. Sure. 6 A. Yes, there is value in bringing in -- 7 again, because, you know, for instance, sports, 8 if it's a Fox -- if we don't -- if a station -- 9 if a small market did not have a Fox affiliate 10 for some reason, yes, it was very important to 11 bring in a national -- to bring in a Fox so 12 that they could see their football games. 13 Q. What are some characteristics of those 14 markets that don't have all four of the big 15 four network broadcast stations? 16 A. So some markets -- 17 Q. Network affiliated? 18 A. So, yeah, so markets that don't have 19 -- that -- they would be -- I can't give you a 20 number. They would be very small markets. You 21 know, some of the major markets have -- L.A., 22 for instance, has probably 20 or 30 local 23 stations. But a smaller market -- and I don't 24 know that there are that many, but they would 25 -- it would be a much smaller market, very</p>	<p>1 cable operator's programming line-up. So you 2 agreed with the testimony of Ms. Meyka? 3 A. Yes, I did. 4 Q. Do you know Ms. Meyka personally? 5 A. I do. 6 Q. You've never chastised her for 7 dishonesty? 8 A. For dishonesty, oh, no. 9 JUDGE STRICKLER: Try to think up your 10 own question. 11 (Laughter.) 12 THE WITNESS: Sorry. I just got what 13 I think you were saying. No, I'm friendly. 14 I've known her from the business for probably 15 10 or 15 years. 16 BY MR. MacLEAN: 17 Q. Okay. So I'm showing you here 18 Allocation Exhibit -- Hearing Exhibit 1037, 19 which is designated and is in evidence already. 20 And this is the testimony of Judith Meyka. Is 21 this the testimony that you reviewed? 22 A. Yes, it looks like it. 23 Q. Taking a looking at paragraph 27, and 24 I'm focusing here in the middle of the 25 paragraph, "live sports programming, local news</p>

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3243	<p>1 and public affairs programming and Public</p> <p>2 Television programming are particularly</p> <p>3 important components of the offering because</p> <p>4 they bring unique content that may not be</p> <p>5 available on other channels in the line-up."</p> <p>6 Do you agree with Ms. Meyka on that</p> <p>7 statement?</p> <p>8 A. You know, I do think I will say that,</p> <p>9 again, satellite and cable are different. And</p> <p>10 so cable is more flexible in what they can</p> <p>11 bring into a local market.</p> <p>12 They can bring in -- if they've</p> <p>13 already launched a market, they can bring in a</p> <p>14 distant signal, and I don't know the rules</p> <p>15 exactly, without getting permission of either</p> <p>16 the stations in the market, if there's a</p> <p>17 competing station. And satellite is just not</p> <p>18 -- it doesn't have the same rules, but --</p> <p>19 again, I would say that I think if you're</p> <p>20 serving a market and you have capacity, you</p> <p>21 know, again, I think it's just like the general</p> <p>22 market platform. I think you do want to serve</p> <p>23 as many customers with as much different</p> <p>24 programming as you can.</p> <p>25 Q. And live sports programming, local</p>	3245	<p>1 capacity.</p> <p>2 So I was only bringing up the</p> <p>3 Ms. Berlin testimony because I think maybe this</p> <p>4 is what she was getting at with her example of</p> <p>5 the L.A. and New York, bringing in a distant</p> <p>6 signal, that, you know, it was trying to serve</p> <p>7 a niche.</p> <p>8 It's -- you know, capacity is just</p> <p>9 very tight. So, you know, we would try to</p> <p>10 launch as many stations and cable networks as</p> <p>11 we could to serve our customers within the</p> <p>12 bounds of, you know, the value equation and the</p> <p>13 capacity we had.</p> <p>14 Q. And among those were devotional</p> <p>15 programs to serve devotional customers?</p> <p>16 A. I'm not aware of any devotional</p> <p>17 programs that we -- networks, excuse me, that</p> <p>18 we brought in on a distant basis, but it could</p> <p>19 be the case. And, again, I can't speak to her</p> <p>20 from a cable perspective. She might have a</p> <p>21 different -- you know, slightly different view</p> <p>22 based on the fact that they have more</p> <p>23 flexibility in what they bring in.</p> <p>24 Q. Now, turning to Ms. Berlin's</p> <p>25 testimony, (Confidential session.)</p>
3244	<p>1 news and public affairs programming and Public</p> <p>2 Television programming are all important</p> <p>3 components of that offering that you want to</p> <p>4 give your subscribers?</p> <p>5 A. They're different levels of value,</p> <p>6 but, you know, again, every -- I think, most</p> <p>7 genres of programming are important to the</p> <p>8 platform. It's just a matter of degrees.</p> <p>9 Q. And so looking at her footnote here,</p> <p>10 footnote 3, and I am so glad that we got a</p> <p>11 footnote here, "to a lesser extent" -- you</p> <p>12 would agree -- "devotional and Canadian</p> <p>13 programming also may also add a unique element</p> <p>14 to the programming mix that might otherwise be</p> <p>15 unavailable to a cable operator"?</p> <p>16 A. I think this may have been where Toby</p> <p>17 was going -- Ms. Berlin was going with her</p> <p>18 testimony.</p> <p>19 Q. This is Ms. Meyka's testimony.</p> <p>20 A. No, but I'm saying -- I'm sorry. I'm</p> <p>21 just -- I'm trying to make the point that I --</p> <p>22 you know, again, that there's -- we do try to</p> <p>23 serve as many -- with 20 million customers, we</p> <p>24 try to serve as many customers, you know,</p> <p>25 everybody's needs to the extent we had</p>	3246	<p>1 //</p> <p>2 //</p> <p>3 //</p> <p>4 //</p> <p>5 //</p> <p>6 //</p> <p>7 //</p> <p>8 //</p> <p>9 //</p> <p>10 //</p> <p>11 //</p> <p>12 //</p> <p>13 //</p> <p>14 //</p> <p>15 //</p> <p>16 //</p> <p>17 //</p> <p>18 //</p> <p>19 //</p> <p>20 (Return to open session.)</p> <p>21 JUDGE STRICKLER: Can you ask the</p> <p>22 question again? I'm sorry.</p> <p>23 (Return to confidential session.)</p> <p>24 //</p> <p>25 //</p>

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<p>1 //</p> <p>2 //</p> <p>3 //</p> <p>4 //</p> <p>5 //</p> <p>6 //</p> <p>7 //</p> <p>8 //</p> <p>9 //</p> <p>10 //</p> <p>11 //</p> <p>12 //</p> <p>13 //</p> <p>14 //</p> <p>15 //</p> <p>16 //</p> <p>17 (Return to open session.)</p> <p>18 JUDGE BARNETT: Thank you.</p> <p>19 BY MR. MacLEAN:</p> <p>20 Q. Would you say that DirectTV valued its</p> <p>21 religious customers?</p> <p>22 A. I would say DirectTV valued every</p> <p>23 single customer. So I think we --</p> <p>24 Q. DirectTV at one point offered Easter</p> <p>25 and Christmas specials from Crystal Cathedral</p>	<p>1 A. Um-hum.</p> <p>2 Q. Right?</p> <p>3 A. Um-hum.</p> <p>4 Q. And you do have to answer yes or no</p> <p>5 for the reporter.</p> <p>6 A. Oh, yes. I'm sorry, yes.</p> <p>7 Q. I'm sorry, that's --</p> <p>8 A. Yeah.</p> <p>9 Q. And that -- and I believe this is</p> <p>10 because, in your words, folks are really</p> <p>11 passionate about their particular sports teams;</p> <p>12 would you agree with that?</p> <p>13 A. I would agree with that.</p> <p>14 Q. Many of these -- I mean, there are</p> <p>15 some devoted fans of these sports teams, would</p> <p>16 you agree?</p> <p>17 A. Yes.</p> <p>18 Q. They idolize their heroes?</p> <p>19 A. That is correct.</p> <p>20 Q. They -- some of them, I mean, they'll</p> <p>21 watch these games religiously sometimes, right?</p> <p>22 (Laughter.)</p> <p>23 THE WITNESS: They're very passionate</p> <p>24 about watching their games.</p> <p>25 BY MR. MacLEAN:</p>
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<p>1 on a Pay Per View basis; is that right?</p> <p>2 A. I think that is correct, yes.</p> <p>3 Q. Would you regard that as devotional</p> <p>4 programming?</p> <p>5 A. I suppose so.</p> <p>6 Q. DirectTV launched its own devotional</p> <p>7 programming, including church services from</p> <p>8 University of Notre Dame; is that right?</p> <p>9 A. I think that's correct, yes.</p> <p>10 Q. And these programs, DirectTV felt,</p> <p>11 served an important niche audience; would you</p> <p>12 agree with that?</p> <p>13 A. I think that, again, there's -- you</p> <p>14 could look at a multiple kind of diverse --</p> <p>15 each audience we served. We, you know, had</p> <p>16 packages of Italian programming. You know, we</p> <p>17 served -- again, you could look at -- you could</p> <p>18 probably slice and dice it numerous ways as to</p> <p>19 the different types of programming -- customers</p> <p>20 we served with our programming.</p> <p>21 So, yes, I mean, devotional would be</p> <p>22 one of the many kind of niches that we tried to</p> <p>23 serve.</p> <p>24 Q. You described sports programming as</p> <p>25 high-value programming, right?</p>	<p>1 Q. I don't -- I don't want to stretch</p> <p>2 this, you know, analogy too far, but do you</p> <p>3 know what Tebowing is?</p> <p>4 A. I do.</p> <p>5 Q. Could you explain?</p> <p>6 A. Can I explain? As in taking a knee?</p> <p>7 Q. In..</p> <p>8 A. I don't know -- it has been a while.</p> <p>9 Q. In prayer?</p> <p>10 A. In prayer, yeah, I know he is -- he</p> <p>11 was big a few years ago.</p> <p>12 Q. Would you agree with me that there's</p> <p>13 some people that are very passionate about</p> <p>14 their religions?</p> <p>15 A. Yes, I would say but as a matter of</p> <p>16 degrees and, you know, I think if you're asking</p> <p>17 whether or not I could value the types of</p> <p>18 programming simply, I would not.</p> <p>19 Q. I understand.</p> <p>20 A. Yeah.</p> <p>21 Q. But, I mean, there are people out</p> <p>22 there who are passionate about their religion?</p> <p>23 A. There are, and I think it's a matter</p> <p>24 of if you're looking at kind of the whole, you</p> <p>25 know, discussion we've had been having around</p>

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3255	<p>1 Marketing and Statistics.</p> <p>2 Q. Who is your current employer and what</p> <p>3 is your current position?</p> <p>4 A. I am a Professor of Marketing at the</p> <p>5 Leonard N. Stern School of Business at New York</p> <p>6 University.</p> <p>7 Q. And where else have you worked?</p> <p>8 A. Oh, before NYU -- and actually during,</p> <p>9 including sabbatical -- I have had either</p> <p>10 permanent or visiting positions at Columbia</p> <p>11 University, Yale, UCLA, and the Wharton School.</p> <p>12 Q. So in all, how -- how long have you</p> <p>13 been teaching?</p> <p>14 A. 37 years.</p> <p>15 Q. And what is the subject matter of your</p> <p>16 specialty?</p> <p>17 A. I teach marketing. My particular</p> <p>18 interests are marketing research and marketing</p> <p>19 strategy and the relationship between them,</p> <p>20 managerial decision-making, and branding, and</p> <p>21 analyzing data obtained through electronic</p> <p>22 commerce.</p> <p>23 Q. And how long have you taught at NYU?</p> <p>24 A. This is year number 29.</p> <p>25 Q. And do you hold any other position at</p>	3257	<p>1 remembering.</p> <p>2 Q. Okay. And what is ISMS? I'm sorry.</p> <p>3 A. ISMS is the INFORMS. INFORMS is a</p> <p>4 professional organization of people, of</p> <p>5 academics and practitioners, who study</p> <p>6 management science, or the application of</p> <p>7 scientific methods to management problems.</p> <p>8 ISMS is the INFORMS Society for</p> <p>9 Marketing Science, which is the branch of</p> <p>10 INFORMS that specializes in marketing problems.</p> <p>11 Q. And have you had any leadership</p> <p>12 positions in any of these professional</p> <p>13 organizations?</p> <p>14 A. I was the founding president of ISMS.</p> <p>15 Q. And have you published any books and,</p> <p>16 if so, how many?</p> <p>17 A. I have published four books. And I'm</p> <p>18 working on a fifth and sixth as we speak.</p> <p>19 Q. And when was your most recent book</p> <p>20 published?</p> <p>21 A. November 2017.</p> <p>22 Q. And in what areas have you published?</p> <p>23 A. My first three books were -- one was a</p> <p>24 textbook on marketing research. Two were a</p> <p>25 textbook and a trade book, both on the same</p>
3256	<p>1 NYU?</p> <p>2 A. Yes. I am the Vice Dean for Doctoral</p> <p>3 Education at the Stern School. It means I am</p> <p>4 the chief executive and I oversee all eight of</p> <p>5 our wonderful doctoral programs.</p> <p>6 Q. And have you held other positions at</p> <p>7 NYU?</p> <p>8 A. I have been the Department Chair of</p> <p>9 two departments. From 1998 to 2004, I was the</p> <p>10 Department Chair of the Marketing Department.</p> <p>11 Currently, in addition to my Vice</p> <p>12 Dean's duties, I serve as the Acting</p> <p>13 Chairperson of the Accounting Department, while</p> <p>14 the school looks for someone to replace me.</p> <p>15 Q. And are you a member of any</p> <p>16 professional organizations?</p> <p>17 A. I am. I'm a member of the American</p> <p>18 Marketing Association, the American Statistical</p> <p>19 Association, the American Association for</p> <p>20 Public Opinion Research, the American</p> <p>21 Psychological Association, the International</p> <p>22 Trademark Association, the Society for Consumer</p> <p>23 Psychology, the INFORMS Society for Marketing</p> <p>24 Science, sometimes called ISMS. And there may</p> <p>25 be one or two others that I just am not</p>	3258	<p>1 subject; the Interface Between Marketing</p> <p>2 Research and Marketing Strategy.</p> <p>3 The most recent one, available on</p> <p>4 Amazon --</p> <p>5 (Laughter.)</p> <p>6 THE WITNESS: -- the most recent one</p> <p>7 is called Shift Ahead, and it is how to -- how</p> <p>8 to stay relevant, how businesses stay relevant</p> <p>9 in a fast-changing environment.</p> <p>10 BY MR. OLANIRAN:</p> <p>11 Q. Have you published any articles?</p> <p>12 A. Yes, several.</p> <p>13 Q. And how many, would you say?</p> <p>14 A. I would say in the neighborhood of 50</p> <p>15 to 55, 50 to 60, somewhere.</p> <p>16 Q. And what are the general subject areas</p> <p>17 of your articles?</p> <p>18 A. Oh, my research has been very</p> <p>19 eclectic. I've -- my research has appeared in</p> <p>20 psychology journals, statistics journals,</p> <p>21 marketing journals, and actually even law</p> <p>22 journals and law reviews.</p> <p>23 Q. And have you been qualified by a court</p> <p>24 or a tribunal as an expert witness before?</p> <p>25 A. Yes, I have.</p>

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<p>1 Q. And approximately how many times have 2 you been qualified as an expert witness? 3 A. Well, I'm going to count two 4 categories. One where I have testified in 5 court and another where reports I have written 6 or studies I have done have been used in 7 summary judgment or denials of class 8 certification where I was never -- I never 9 testified under oath, but I'm going to count 10 that as the court giving credibility to my 11 views. And I would say that is probably 12 totaling about 25. 13 Q. And have you worked as a 14 non-testifying expert outside of the two 15 categories that you just described? 16 A. I have. I have written several 17 reports on cases that have settled. I have 18 worked as a consulting expert. I have actually 19 been a testifying expert on cases where I was 20 deposed, but the case never went to trial, 21 where I didn't have an opportunity to be 22 qualified by the court. 23 And I would say when you add up all 24 those together, it's probably another 40. 25 Q. Okay. And before what types of bodies</p>	<p>1 A. Survey research is a big part of my 2 life. I was -- first of all, as I mentioned 3 earlier, I am an author of a textbook on 4 marketing research, much of which is about how 5 to conduct consumer surveys and surveys in 6 general. 7 A lot of my research has been on 8 survey methodology. When I took a sabbatical 9 once, I went in-house at a survey research firm 10 to be an in-house consultant for a few months. 11 I was the editor of a journal for six 12 and a half years, in which case I evaluated 13 probably a couple of hundred surveys a year, as 14 to their publishability. Pretty broad. 15 Q. And have you conducted your own 16 surveys? 17 A. Very frequently. 18 Q. And how many surveys would you say you 19 have conducted on your own? 20 A. Probably hundreds. 21 Q. And of those surveys that you 22 conducted on your own, what percentage utilize 23 survey questionnaires? 24 A. I would say almost all of them, if not 25 all of them. I can't recall any that did not.</p>
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<p>1 have you been qualified by? 2 A. Federal Court, District Court, 3 Arbitration Boards, NAD proceedings. 4 Q. What are NAD proceedings? 5 A. The National Advertising Division of 6 the Better Business Bureau. And that's -- I 7 think that's about it. 8 Q. And can you tell us the substantive 9 areas of law involved in the cases in which you 10 have been involved as an expert witness, 11 whether you testified or not? 12 A. Sure. A lot of it is trademark. Some 13 of it is patent, antitrust, licensing 14 agreements, tax. Did I say -- I said patents. 15 It depends, if there is an issue of -- related 16 to marketing or data analysis that I can 17 provide value. 18 Q. Okay. And in what subject areas have 19 you been qualified to testify in, I mean, in 20 the subject areas of your expertise? 21 A. Marketing, marketing research, 22 consumer surveys, marketing strategy, branding, 23 forecasting, valuation, et cetera. 24 Q. Okay. And could you describe 25 generally your experience with survey research?</p>	<p>1 Q. And how many of those survey 2 questionnaires did you design on your own? 3 A. All of them. 4 Q. And have you ever evaluated survey 5 research conducted by others? 6 A. Yes. 7 Q. And about how many? 8 A. Well, as I said, as journal editor, 9 probably a couple hundred a year for six and a 10 half years. And I have done it in the context 11 of being an expert in litigation, I don't know, 12 maybe between 10 and 20 times. 13 Q. And in what industries have you 14 applied your survey research experience? 15 A. Again, a wide variety. Consumer 16 packaged goods, consumer electronics, 17 pharmaceuticals, medical devices, blood glucose 18 meters, and more recently slot machines. 19 Q. And has any of your survey work 20 involved valuation? 21 A. Yes. 22 Q. And could you give an example of that, 23 please? 24 A. Sure. Let me -- let me start with a 25 litigation that was -- that the material of</p>

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<p>1 which I know is in the public domain. Well, I 2 don't even have to go into all the detail. 3 The valuing of fat content on a salty 4 snack food, valuing the use of a brand name on 5 a residential complex, valuing a patent that 6 was allegedly infringed in the manufacturing of 7 a DVR. 8 Q. Okay. Thank you. 9 And did you submit a more detailed bio 10 of your background and experience with your 11 testimony? 12 A. I did. 13 MR. OLANIRAN: Your Honors, we offer 14 Dr. Steckel as an expert in market research, 15 survey research, and valuation. 16 JUDGE BARNETT: Hearing no objection, 17 Professor Steckel is so qualified. 18 MR. OLANIRAN: Thank you, Your Honor. 19 BY MR. OLANIRAN: 20 Q. Dr. Steckel, what were you asked to do 21 in this proceeding? 22 A. I was asked to do two different things 23 at two different times. First, I was asked to 24 render a professional opinion on the 2004-2005 25 Bortz surveys as to their reliability and</p>	<p>1 those surveys alleviated any of the concerns I 2 had. 3 And the third thing I was asked to do 4 in the second wave of tasks was to render an 5 opinion on whether the survey submitted by the 6 Canadian Claimants changed my view of -- of any 7 of the Bortz surveys. 8 Q. Okay. Thank you for that 9 clarification. 10 Did you prepare written reports of 11 your findings and conclusions? 12 A. I did. 13 Q. And you should have a black binder in 14 front of you with a green cover. Do you see 15 that? 16 A. I do. 17 Q. Would you please turn to the document 18 marked as Exhibit Number 6014, 6-0-1-4. 19 A. Yes, sir. 20 Q. And would you please identify that 21 document? 22 A. This document is the direct testimony 23 which reflects my work in the first wave of 24 assignments I was given in this matter. 25 Q. That would be the Written Direct</p>
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<p>1 validity. 2 And then I was asked to also render a 3 similar opinion on the 2010-2013 Horowitz 4 surveys and to express a general opinion as to 5 which one is more suitable to the current 6 proceedings. 7 Q. Just a point of correction. You said 8 2004/2005 Bortz surveys. Did you mean 9 2010-2013 Bortz surveys? 10 A. Well, that's -- no, I did mean 11 2004-2005 because that was the first thing I 12 was asked to do. 13 Q. Okay. 14 A. Right? And compare that to the 15 structure of the 2010-2013 Horowitz surveys. 16 The second set of tasks I was asked to 17 perform were -- occurred after the 2010-2013 18 Bortz surveys were submitted. 19 And therein I was asked to assess 20 whether any improvements to the 2010 -- from 21 the 2004-2005 Bortz surveys, alleviated any 22 concerns I had about those earlier Bortz 23 surveys. 24 I was also asked to render an opinion 25 on whether Dr. Nancy Mathiowetz's support of</p>	<p>1 Testimony of Joel Steckel, filed on December 2 22nd? 3 A. That's correct. 4 Q. Would you please also turn to the 5 document marked as Exhibit 6015. 6 A. Yes. 7 Q. And would you please identify that 8 document? 9 A. That document, entitled Rebuttal 10 Testimony of Joel Steckel, submitted September 11 15th of 2017, reflects the work I've done in 12 the second wave of tasks that I mentioned a few 13 minutes ago. 14 Q. And are these the reports of your 15 findings and conclusions submitted in this 16 proceeding? 17 A. Yes, they are. 18 Q. Were you responsible for preparing 19 these reports? 20 A. I was. 21 Q. And do you have any corrections or 22 additions to either one of the exhibits? 23 A. Not at this moment. 24 Q. Do you declare Exhibits 6014 and 6015 25 to be true and correct and of your personal</p>

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<p>1 knowledge?</p> <p>2 A. They appear to be, yes.</p> <p>3 Q. These exhibits are already admitted</p> <p>4 into evidence, so we don't need to move for</p> <p>5 admission.</p> <p>6 I would like to focus on your opinion</p> <p>7 and conclusions as set forth in your written</p> <p>8 direct testimony, but, first, I wanted to ask</p> <p>9 you some questions regarding your understanding</p> <p>10 of the compulsory licensing proceeding. Okay?</p> <p>11 A. Okay.</p> <p>12 Q. And what is your understanding of the</p> <p>13 question at issue in this proceeding?</p> <p>14 A. That these proceedings are being</p> <p>15 conducted to allocate copyright royalties to</p> <p>16 the copyright owners of programs that were</p> <p>17 distantly transmitted by U.S. cable television</p> <p>18 stations in the years 2010 to 2013.</p> <p>19 Q. And what is your understanding of the</p> <p>20 standard which has been used to make the</p> <p>21 allocation determination?</p> <p>22 A. My understanding of the standard is</p> <p>23 that the royalties are to be allocated</p> <p>24 according to the relative marketplace values of</p> <p>25 the programming in each of the categories at</p>	<p>1 research most often generalizes about --</p> <p>2 generalizes the attitudes, experiences,</p> <p>3 opinions or interests of a population at large</p> <p>4 by sampling a subset of that population.</p> <p>5 Q. And are there any generally-accepted</p> <p>6 criteria that a survey must conform to in</p> <p>7 general?</p> <p>8 A. There are. Lots of professional</p> <p>9 organizations have a wide variety of lists of</p> <p>10 these are what a survey should conform to, and</p> <p>11 this is how -- the characteristics a survey</p> <p>12 should have.</p> <p>13 But when it comes down to it, in my</p> <p>14 view there are really only two things. They</p> <p>15 all fall into two considerations. A survey</p> <p>16 must be reliable and a survey must be valid.</p> <p>17 And as researchers we refer to that as</p> <p>18 the reliability and validity of the survey.</p> <p>19 Q. I'm sorry. And what does reliability</p> <p>20 mean?</p> <p>21 A. Okay. I was about to get to that.</p> <p>22 Reliability refers to the consistency of any</p> <p>23 measure that is taken. So, for example if you</p> <p>24 take a measure and I take a measure or if I</p> <p>25 take a measure twice, we're going to get the</p>
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<p>1 issue.</p> <p>2 Q. And do you know the types of evidence</p> <p>3 that decision-makers have relied on in</p> <p>4 allocating royalties in past proceedings?</p> <p>5 A. Well, historically my understanding is</p> <p>6 that decision-makers have relied on viewing</p> <p>7 data.</p> <p>8 But in the last couple of proceedings,</p> <p>9 my understanding is that decision-makers have</p> <p>10 used a survey proffered by the Joint Sports</p> <p>11 Claimants and conducted by the Bortz</p> <p>12 organization, the Bortz survey, as a basis from</p> <p>13 which to base -- to make those allocations.</p> <p>14 Q. Okay. And I would also like to ask</p> <p>15 you some questions regarding survey research,</p> <p>16 your knowledge of survey research in general.</p> <p>17 What is the purpose of surveying as a</p> <p>18 research method?</p> <p>19 A. Surveys are used as a research method</p> <p>20 to generalize about the characteristics of some</p> <p>21 population from examining information on a</p> <p>22 subset of that population. Usually that</p> <p>23 population is a set of people or a set of human</p> <p>24 beings.</p> <p>25 So at least in my world survey</p>	<p>1 same reading. We're going to get the same</p> <p>2 value of the measurement.</p> <p>3 So -- and validity refers to the</p> <p>4 ability of a survey to represent what it is</p> <p>5 actually supposed to represent.</p> <p>6 And a particular type of validity that</p> <p>7 is at issue in this case, in my opinion, is</p> <p>8 construct validity, which means that what you</p> <p>9 are measuring, what your measure actually</p> <p>10 reflects what it is you are, indeed, measuring.</p> <p>11 So let me illustrate. Let me give you</p> <p>12 an example with my watch. Sunday was Daylight</p> <p>13 Savings Time. It changed. Suppose I forgot to</p> <p>14 move my watch ahead.</p> <p>15 If we looked at my watch, if the</p> <p>16 Judges and I all looked at my watch, we would</p> <p>17 get the same reading. That would be a reliable</p> <p>18 measure of the time.</p> <p>19 It would not be a valid measure of the</p> <p>20 time because it would be wrong. It would not</p> <p>21 be reflective of what the time is. It would be</p> <p>22 an hour off.</p> <p>23 So that's an example of the</p> <p>24 distinction between reliability and validity.</p> <p>25 And so looking at a -- at my watch, which</p>

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<p style="text-align: right;">3271</p> <p>1 wasn't reset, would be -- would not have 2 construct validity as a measure of time, but, 3 if I had reset it, it would. 4 Q. Are there general practice principles 5 that help ensure validity and reliability of 6 survey measures? 7 A. There are. And that is, indeed, where 8 the professional organizations and scientific 9 governing bodies, if you will, come in. The 10 Council of American Survey Research 11 Organizations, the American Association of 12 Public Opinion Research, all have their own Ten 13 Commandments of survey research, if you will. 14 The Federal Judicial Center Manual of 15 Complex Litigation has seven characteristics to 16 which a survey must conform. 17 Q. Could we go to -- I'm sorry. 18 A. And I believe those are in my direct 19 testimony. 20 Q. Could we go to page 8. There you go. 21 Would you please talk about the 22 Federal Judicial Center Manual of Complex 23 Litigation and the factors that you were just 24 talking about? 25 A. Well, this is a list that generally</p>	<p style="text-align: right;">3273</p> <p>1 A. Well, constant sum questions are -- 2 are common in marketing research. If I wanted 3 to ask a consumer, for example, to allocate 100 4 chips according to their relative preference 5 for Coke and Pepsi, and they may say 67/33, and 6 that gives me some information about which they 7 prefer and something about the magnitude by 8 which they prefer one to another. 9 Q. Now, turning to the testimony that you 10 discuss, in your testimony, the Bortz -- you 11 discuss the following testimonies. You have 12 the Bortz survey questionnaire used for 2010 13 through '13; is that correct? 14 A. Yes. 15 Q. You also address the Horowitz surveys 16 used for 2010 through '13; is that correct? 17 A. Yes. 18 Q. And then the Bortz survey used in the 19 '04-'05. Is that right? 20 A. Yes. 21 Q. So let me start first with the 2010 22 through '13 Bortz survey as addressed in your 23 testimony. Okay? 24 A. Sure. 25 Q. And what is your understanding of the</p>
<p style="text-align: right;">3272</p> <p>1 governs a lot of the expert witness work that I 2 have done and that I have been asked about. 3 This is just one set of criteria that 4 when you take a look at, are all collectively 5 designed to ensure the reliability and validity 6 of a survey that is being performed. 7 For example, the data are accurately 8 reported, the population is clearly chosen and 9 defined. One that I think is important here is 10 that the questions asked were clear and not 11 leading. 12 Q. Okay. And I also want to ask you, are 13 you familiar with the survey research type 14 known as constant sum? 15 A. Yes. 16 Q. And what is constant sum? 17 A. Constant sum scales or constant sum 18 measures are the types of measures that are 19 derived when a survey respondent is given a 20 certain number of points or chips or -- or 21 specific objects to allocate or marble to 22 allocate across several categories according to 23 some criterion. 24 Q. And under what circumstances are 25 constant sum questions used?</p>	<p style="text-align: right;">3274</p> <p>1 objective of the 2010 through '13 Bortz survey? 2 A. My understanding is that the Bortz 3 survey was designed to measure the relative 4 value to cable system operators of the various 5 categories of retransmitted, distantly 6 retransmitted programming. 7 Q. Okay. And what is your general 8 understanding of the process for the 2010 9 through '13 Bortz survey? 10 A. Well, I don't think there was anything 11 tremendously unusual about the process, that a 12 stratified sample was constructed of Form 3 13 cable systems, which were then subject to a -- 14 which -- at which an individual was identified 15 as being the person most responsible for signal 16 investment decisions. 17 And then that individual was put 18 through a telephone interview in which some 19 initial questions were asked, some warm-up or 20 lead-in questions, leading to the -- what I 21 like to call the money question, which was the 22 constant sum resource allocation question. 23 Q. And let's now switch over to your 24 understanding of the Horowitz -- the 2010 25 through '13 Horowitz survey.</p>

<p style="text-align: right;">3275</p> <p>1 What is your understanding of the</p> <p>2 objective of the Horowitz 2010 through '13</p> <p>3 survey?</p> <p>4 A. Well, the Horowitz survey had two</p> <p>5 objectives, as I understand it. One is similar</p> <p>6 to the Bortz survey, to assess the relative</p> <p>7 value of the categories of programming.</p> <p>8 But also the Horowitz survey put forth</p> <p>9 a few improvements, quote/unquote, to the</p> <p>10 original Bortz survey, to the 2004/2005 version</p> <p>11 of the Bortz survey.</p> <p>12 And a secondary objective was to see</p> <p>13 what the impact of those improvements would be.</p> <p>14 Q. Okay. And what is your understanding</p> <p>15 of the process undertaken by Horowitz in</p> <p>16 conducting the 2010 through '13 survey?</p> <p>17 A. Well, as I say, the process was</p> <p>18 relatively similar, except for the</p> <p>19 implementation of some alleged improvements.</p> <p>20 Q. Do you have that in your -- in your --</p> <p>21 A. It's in my report, in my direct</p> <p>22 testimony. And I believe it is on pages, if I</p> <p>23 remember, 19 to 20. Did I get that right?</p> <p>24 Yes, I did.</p> <p>25 Q. I think it starts on page 19 of</p>	<p style="text-align: right;">3277</p> <p>1 stations. The Horowitz survey does.</p> <p>2 The Horowitz survey provides warm-up</p> <p>3 questions, which the updated Bortz survey did,</p> <p>4 intended to enhance the likelihood of low</p> <p>5 reason, non-reflective responses. Bless you.</p> <p>6 JUDGE BARNETT: Thank you.</p> <p>7 THE WITNESS: And, unlike the Bortz</p> <p>8 survey, the Horowitz survey reminds responses</p> <p>9 not to assign any value to programs that are</p> <p>10 substituted for WGN's blacked-out programming.</p> <p>11 And I believe that's it.</p> <p>12 BY MR. OLANIRAN:</p> <p>13 Q. Okay. Now, just to make the record</p> <p>14 clear, you made the -- you keep making the</p> <p>15 reference to the '04-'05 Bortz survey.</p> <p>16 To be clear, your direct testimony</p> <p>17 addresses the Horowitz survey, which is based</p> <p>18 on the '04-'05 Bortz survey; is that correct?</p> <p>19 A. The improvements to the Horowitz</p> <p>20 survey made or the changes the Horowitz survey</p> <p>21 made were changes from the '04-'05 Bortz</p> <p>22 survey, not changes from the 2010 to 2013 Bortz</p> <p>23 survey.</p> <p>24 Q. Okay. Because as of when the Horowitz</p> <p>25 report was submitted, this was during the</p>
<p style="text-align: right;">3276</p> <p>1 Exhibit 6014.</p> <p>2 A. Okay.</p> <p>3 Q. Please proceed.</p> <p>4 A. So here are the improvements or,</p> <p>5 unlike Bortz, which has only one category for</p> <p>6 sports, Horowitz distinguishes between live</p> <p>7 professional and college team sports.</p> <p>8 Horowitz enhances program category</p> <p>9 descriptions by providing examples. Bortz --</p> <p>10 and this is relative to the 2004-2005 Bortz</p> <p>11 survey.</p> <p>12 Q. Okay.</p> <p>13 A. Bortz asks for resource allocation</p> <p>14 from a complete predefined list. The Horowitz</p> <p>15 survey customizes its list. Bortz repeatedly</p> <p>16 asks questions about types of programming</p> <p>17 during the years across all stations, other</p> <p>18 than the national network programming from ABC,</p> <p>19 CBS, and NBC.</p> <p>20 The Horowitz survey continuously --</p> <p>21 continually reminds respondents about the</p> <p>22 specific broadcast stations at issue.</p> <p>23 More specific, the Bortz survey does</p> <p>24 not include systems that carry only PBS</p> <p>25 stations or systems that carry only Canadian</p>	<p style="text-align: right;">3278</p> <p>1 direct phase of the submissions; is that</p> <p>2 correct?</p> <p>3 A. Right. They obviously had no access</p> <p>4 to the Bortz 2010-2013 surveys.</p> <p>5 Q. Thank you. And do you have an opinion</p> <p>6 about whether the 2010-'13 Bortz survey and the</p> <p>7 2010 through '13 Horowitz survey can assist in</p> <p>8 the determination of relative marketplace value</p> <p>9 of programming at issue in this case?</p> <p>10 A. I do.</p> <p>11 Q. And what is that opinion?</p> <p>12 A. Well, my opinion is that, frankly, I</p> <p>13 don't think either one of them can. I don't</p> <p>14 think either one of the surveys is useful for</p> <p>15 determining the relative marketplace value of</p> <p>16 the various categories of programming in the</p> <p>17 retransmitted signals.</p> <p>18 Q. And why not?</p> <p>19 A. Lots of reasons. So -- but they fall</p> <p>20 into two categories. One is that the measure</p> <p>21 obtained from the constant sum resource</p> <p>22 allocation question lacks construct validity</p> <p>23 for marketplace value. In other words, it does</p> <p>24 not measure marketplace value.</p> <p>25 The second is that the task that a</p>

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3279	<p>1 respondent goes through in answering that money</p> <p>2 question, the constant sum resource allocation,</p> <p>3 is really too complex to be reliable or valid</p> <p>4 at all.</p> <p>5 Q. So let's take the first reason, which</p> <p>6 is the construct validity issue.</p> <p>7 So are you saying that the constant</p> <p>8 sum allocation question in the Bortz survey</p> <p>9 does not measure marketplace value?</p> <p>10 A. That's exactly what I'm saying.</p> <p>11 Q. And can you explain this, what you</p> <p>12 mean, and why you think it doesn't?</p> <p>13 A. Sure, I can. It would be useful if we</p> <p>14 have a copy of a Bortz questionnaire.</p> <p>15 Q. Could we pull up Exhibit 6020, please.</p> <p>16 Thank you.</p> <p>17 A. Okay.</p> <p>18 Q. Do you see that in front of you?</p> <p>19 A. I do.</p> <p>20 Q. Okay. Now, this is Exhibit 6020 and</p> <p>21 it is a restricted exhibit. But I don't --</p> <p>22 JUDGE BARNETT: Mr. Olaniran, I think</p> <p>23 Ms. Plovnick just used a blank form in her</p> <p>24 examination of the prior witness. I see no</p> <p>25 reason we can't use that blank form instead of</p>	3281	<p>1 So let me start with the first one.</p> <p>2 The first one is in the very first line of</p> <p>3 Question 4a: Now I would like you to estimate</p> <p>4 the relative value to your cable system of each</p> <p>5 category of programming, actually broadcasted</p> <p>6 by the stations I mentioned, et cetera.</p> <p>7 Relative value is not necessarily</p> <p>8 marketplace value. The term "value" here is</p> <p>9 ambiguous. There are a variety of ways that</p> <p>10 people can interpret value, at least in this</p> <p>11 case in particular. How much money does the</p> <p>12 company make from each of these categories?</p> <p>13 What is the financial return?</p> <p>14 And in my experience as a business</p> <p>15 school professor, when people talk about the</p> <p>16 value of an asset or the value of an</p> <p>17 investment, that is what they are talking</p> <p>18 about.</p> <p>19 In contrast, marketplace value is</p> <p>20 usually interpreted as some measure of price or</p> <p>21 the outcome of an arms-length negotiation. And</p> <p>22 those are two very different things.</p> <p>23 Q. Now, do you have an illustration of</p> <p>24 how this could be different? Oh, these are</p> <p>25 different, I'm sorry, two different things.</p>
3280	<p>1 one that is filled in.</p> <p>2 MR. OLANIRAN: We would have to go to</p> <p>3 Exhibit, I think, 1001. I don't know if she</p> <p>4 still has that up. That would be the Bortz</p> <p>5 report.</p> <p>6 THE WITNESS: That would be fine with</p> <p>7 me.</p> <p>8 MR. OLANIRAN: Do you have that up?</p> <p>9 Thanks a lot.</p> <p>10 I think she was looking at B-20.</p> <p>11 MR. GARRETT: 20.</p> <p>12 MR. OLANIRAN: Thank you.</p> <p>13 THE WITNESS: Okay. So this is a very</p> <p>14 -- I'm sorry.</p> <p>15 BY MR. OLANIRAN:</p> <p>16 Q. And you were talking about your</p> <p>17 concern about whether or not the constant sum</p> <p>18 question was -- measured marketplace value.</p> <p>19 A. That's right.</p> <p>20 Q. And you were about to discuss why.</p> <p>21 A. So there are two bridges that would</p> <p>22 have to be crossed for the constant sum value</p> <p>23 allocation to reflect marketplace value. And</p> <p>24 the question and the Bortz methodology does not</p> <p>25 cross either of the bridges.</p>	3282	<p>1 A. Well, they are different because one</p> <p>2 is a price and one is how much money it makes</p> <p>3 the company. If the amount of money it makes</p> <p>4 the company isn't greater than the price, I</p> <p>5 won't buy it.</p> <p>6 I think the second bridge is where I</p> <p>7 have a more effective illustration, and that is</p> <p>8 between value and the allocation task itself.</p> <p>9 Okay? And so the allocation is based on an</p> <p>10 instruction, what percentage of any of the</p> <p>11 fixed dollar amount would your system have</p> <p>12 spent on -- whatever. Okay.</p> <p>13 So it -- for this question to have</p> <p>14 construct validity, this question or the</p> <p>15 answers to this -- to this question have to</p> <p>16 correspond to value. How much I spend has to</p> <p>17 correspond to how much it is worth. And I have</p> <p>18 created a stylized example that demonstrates</p> <p>19 that that is not true.</p> <p>20 Q. And --</p> <p>21 A. And it is on page 26 and 27 of my</p> <p>22 direct testimony.</p> <p>23 Q. Okay.</p> <p>24 A. And so for purposes here, I'm going to</p> <p>25 assume that -- two things. One, that value is</p>

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<p>3283</p> <p>1 financial return, how much money it makes the 2 company. 3 And I have a simple example where a 4 cable operator has to invest \$500 in two 5 signals, each of which represents a unique 6 category. One represents movies and one 7 represents non-network news. 8 And I have to allocate \$500 according 9 to those two categories. Okay? 10 So there are two tables on page 27. 11 The first one is a payoff table. 12 Q. And what do you mean by payoff table? 13 A. A payoff table tells you what the 14 payoff would be or the financial return from an 15 investment of part of that \$500 in each of the 16 two categories, movies or non-network news. 17 So, for example, if I invest \$300 in 18 movies, I will get a financial return of 19 \$100,500. 20 Q. You are still looking at the first 21 table? 22 A. I am still looking at the payoff 23 table. 24 Q. Thank you. 25 A. If I invest \$500 in non-network news,</p>	<p>3285</p> <p>1 entry in the scenario table. 2 And so total return, or total value, 3 total money made from this resource allocation 4 is maximized -- well, actually, you get that in 5 the last column by adding up the two entries in 6 the return from movies and return from 7 non-network news column. 8 You add those two up and you get total 9 return and you can see total return is 10 maximized by an allocation of \$100 to movies, 11 \$400 to network news. 12 However, that being the optimal and 13 the rational business allocation, that is very 14 different from the total return that you get, 15 which is over -- which is about 90 percent 16 movies, 10 percent non-network news. 17 If, going back to Bortz, if I'm 18 responding to this questionnaire as somebody 19 who is considering value as how much money it 20 makes the station, then I would allocate \$100 21 to movies and \$400 to network news. 22 But for the -- for the correspondence 23 to be made between value and resource 24 allocation, that would imply that I would have 25 to spend 90 percent of the resources on movies,</p>
<p>3284</p> <p>1 I will get a financial return of \$13,825. 2 Q. Okay. 3 A. Okay? So I'm going to consider 4 everything in increments of \$100. 5 The table below, the second table, is 6 a scenario table which lists six possible 7 scenarios or ways to allocate that \$500. 8 0/500, 100/400, all the way down to 400/100, 9 500/0. 10 Q. And the pairs that you have just read 11 are possible combinations of -- possible 12 combinations of your investment in movies and 13 non-network news? 14 A. Right. It is the allocation of my 15 \$500 across the two categories. 16 Q. Okay. 17 A. So then in the second set of columns, 18 in this scenario table I have the corresponding 19 payoffs that were taken from the payoff table 20 above. 21 So, for example, in the third row, I 22 have \$200 for movies and \$300 for network news. 23 If you go to the payoff table and see 24 resources invested in movies, I have \$100,400, 25 which is what -- which is the corresponding</p>	<p>3286</p> <p>1 which is very different than the optimal 2 allocation, which only has 20 percent of the 3 resources spent on movies. 4 So resource allocation does not 5 correspond to value when value is thought of as 6 how much money is being made. 7 Q. So are you saying that Bortz are 8 responding to think about financial return, 9 when they hear the word "value" in that 10 Question 4a that we were just looking at? 11 A. Well, I would be amazed if some of 12 them weren't, because in my experience that's 13 the most common interpretation of the word 14 "value" when it comes to a business asset, 15 which these signals are. 16 But it doesn't have to be. There is a 17 reasonable interpretation of the word "value" 18 in that question that leads to a conclusion 19 that resource allocation does not represent 20 that term value, that interpretation of value. 21 Q. Could there be other interpretations 22 of value? 23 A. Well, you know, I -- I'm not sure 24 exactly what they are. I mean, you know, 25 somebody could maybe be guessing as to what the</p>

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<p>1 price would be, the marketplace value, or the 2 result of an arm's-length negotiation might be, 3 but I would be surprised. 4 Well, let me put it this way. I will 5 be conservative. I will be surprised if nobody 6 read the word "value" in that question as 7 referring to how much money would be made by 8 the investment. 9 JUDGE STRICKLER: You are saying the 10 question is inherently ambiguous because there 11 is no clarity in that regard as to the 12 distinction between marginal value and total 13 value? 14 THE WITNESS: Well, I haven't even 15 talked about marginal value. I'm talking about 16 increments. I am not looking at marginal yet. 17 Incremental is related to marginal, 18 but I'm saying the question is ambiguous in 19 that it -- in that it doesn't define value. 20 I'm also saying that the assumption 21 that -- that any definition of value is related 22 to resource allocation, unless that definition 23 of value is how much I'm going to allocate my 24 resources to, is incorrect. 25 BY MR. OLANIRAN:</p>	<p>1 11 steps I came up with. 2 Now, the revised Bortz survey, these 3 11 steps are somewhat different, but they are 4 still a little -- they are still similar in 5 characteristic. 6 So, for example, the first three 7 steps, recall the stations carried by the cable 8 system, recall all types of programming 9 offered, mentally separating out programming 10 from network programming, and remembering about 11 Fox, this is all for the purpose of identifying 12 the programming that is compensable or that I 13 understand to be compensable. Okay? 14 Then 4 is organizing them into 15 categories. 16 5 is no longer necessary because of 17 the removal of the subscriber acquisition and 18 retention phrase from the question. 6 is 19 simply the accounting of costs. 20 But 7 is really an extremely important 21 step. 7, in conjunction with -- can we scroll 22 back up, please -- so 4 and 7, organizing the 23 programming on stations into program categories 24 and 7 is mapping the unit of acquisition to the 25 categories of programming offered.</p>
3288	3290
<p>1 Q. And so let's turn to the second major 2 reason that you believe the Bortz measures fall 3 short of the mark with regard to -- you spoke 4 about the complexity of the money question, I 5 think you said. 6 A. Yes. 7 Q. And would you please elaborate on what 8 you mean by the complexity of the question? 9 A. Well, I think the mental model or the 10 mental process that a respondent has to go to 11 to answer that allocation question in an 12 appropriate way is extremely complex and 13 difficult. And that's aside from whatever the 14 definition of value is. 15 So there's actually, in my direct 16 testimony, there is an 11-step process that is 17 outlined. 18 Q. Look at page 29, I think. 19 A. Sounds about right. Okay. So when I 20 first studied the 2004-2005 Bortz surveys and I 21 wanted to decide what was -- or examine what a 22 respondent had to do to actually allocate those 23 resources, regardless of what that allocation 24 meant, regardless of whether it related to 25 value or not, this was the 11 -- this was the</p>	<p>1 And I have a demonstrative that helps 2 illustrate the complexity of doing 4 and 7. 3 Q. Okay. Let's go to the first slide, 4 please. And can you please describe the 5 demonstrative? 6 A. Yeah, happy to. 7 So this example is assuming that a 8 cable system has two signals and has allocated 9 the program on those two signals into four -- 10 into six categories. And this is what a 11 respondent has to do in order to be able to 12 successfully answer the question. 13 The respondent makes decisions with 14 respect to, and has as units of their analysis, 15 the things on the left-hand side of this map. 16 Q. And what are those -- sorry to 17 interrupt you. What are those things? 18 A. The signals on the component programs, 19 the compensable component program. 20 Q. Thank you. 21 A. What Bortz is asking them is about 22 things on the right. And so in order for the 23 respondent to be able to effectively allocate 24 resources in a manner consistent with the Bortz 25 request, they have to go through this map in</p>

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3291	<p>1 realtime on a telephone survey.</p> <p>2 And this is for a simple case. This</p> <p>3 is for a case where there are two signals. And</p> <p>4 I want to start with this as an illustration.</p> <p>5 So if we go to the next slide, this is</p> <p>6 what happens if we go to four signals. We have</p> <p>7 a spider web, a very complex spider web.</p> <p>8 Q. Could you please explain what's going</p> <p>9 on with this spider web? You have four signals</p> <p>10 and --</p> <p>11 A. Four signals, each with ten programs.</p> <p>12 Q. Okay.</p> <p>13 A. And the respondent in coming up with</p> <p>14 the resource allocation across categories has</p> <p>15 to map what's in those signals to the six</p> <p>16 categories on the right, and this, it looks</p> <p>17 like either a spider web or something out of a</p> <p>18 Star Trek laser fight.</p> <p>19 Q. And the lasers you are referring to --</p> <p>20 A. Are the links between the programs</p> <p>21 within signals, nested within signal on the</p> <p>22 category.</p> <p>23 Q. And those are the arrows leading from</p> <p>24 each program being mapped to a particular</p> <p>25 category as required by the surveys; is that</p>	3293	<p>1 So I have a lot of neckties that I</p> <p>2 didn't buy there. I bought some at Brooks</p> <p>3 Brothers in Manhattan, or wherever. Okay? And</p> <p>4 then the blue, aggregating the blue is like</p> <p>5 each of these spokes in the spider web.</p> <p>6 And so that's the kind of task that</p> <p>7 Bortz is really asking its respondents to</p> <p>8 perform. And I just think that is pretty hard.</p> <p>9 Q. I am wearing a necktie with three</p> <p>10 different types of blues. I don't know what</p> <p>11 that means.</p> <p>12 A. Yeah, I know. If I had thought in</p> <p>13 advance, I would have brought a multi-colored</p> <p>14 tie to better illustrate. But this one would</p> <p>15 be easy. It's all blue.</p> <p>16 Q. But going back to, again, staying with</p> <p>17 the complexity of these problems, do you have</p> <p>18 -- do you understand that there are certain</p> <p>19 types of broadcast signals on which all of the</p> <p>20 programming on those broadcast signals are</p> <p>21 compensable, such as the programs on Fox, for</p> <p>22 example?</p> <p>23 A. Okay.</p> <p>24 Q. Are you aware?</p> <p>25 A. So then if that's the case, that's</p>
3292	<p>1 correct?</p> <p>2 A. Right. And so -- but we're still even</p> <p>3 not done. We're not done because what the</p> <p>4 respondent then has to do, once he or she does</p> <p>5 this -- and I remind you, in the Bortz survey</p> <p>6 and the Horowitz survey he or she is doing this</p> <p>7 on the telephone in realtime -- what the</p> <p>8 respondent has to do is then aggregate within</p> <p>9 each category.</p> <p>10 So, in other words, let me try to give</p> <p>11 you an example that may bring this to life a</p> <p>12 little bit more.</p> <p>13 My wife and I tend to go shopping at a</p> <p>14 mall in New Jersey called the Garden State</p> <p>15 Mall. And particularly she likes Nordstrom's</p> <p>16 in that mall. So over the years I have bought</p> <p>17 a lot of neckties in that mall.</p> <p>18 So what Bortz is asking a respondent</p> <p>19 to do is akin to asking me how much did I pay</p> <p>20 for the blue that's in my neckties that I</p> <p>21 bought in the Garden State Mall in that</p> <p>22 Nordstrom's, where going to the Nordstrom's and</p> <p>23 the Garden State Mall is like separating the</p> <p>24 compensable from the non-compensable</p> <p>25 programming.</p>	3294	<p>1 like incorporating a solid blue tie. That</p> <p>2 makes my task just a tiny bit easier because I</p> <p>3 don't have to worry about whether any of my</p> <p>4 solid blue ties were bought at Nordstrom's or</p> <p>5 Brooks Brothers.</p> <p>6 Q. Well, actually, I was asking a</p> <p>7 different question. On Fox broadcast stations,</p> <p>8 all of the programs are compensable.</p> <p>9 A. I see.</p> <p>10 Q. Yes.</p> <p>11 A. All right. So I didn't, I'm sorry, I</p> <p>12 did not understand your question. So this</p> <p>13 spider web then becomes infinitely more</p> <p>14 complex.</p> <p>15 So let's say if a Fox program is on</p> <p>16 average an hour and my guess is that they are</p> <p>17 not, that they are probably on average shorter,</p> <p>18 if not almost all shorter, then there would be</p> <p>19 24 instead of ten elements in a signal A -- if</p> <p>20 signal A was Fox, then it wouldn't stop at</p> <p>21 program 10. It would stop at program 24 or, if</p> <p>22 all the programs were half hours, program 48.</p> <p>23 And just making this an -- it makes it</p> <p>24 an impossible task to navigate a spider web</p> <p>25 that is that large.</p>

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1 Q. Would it be acceptable if the
2 respondents were familiar with what they have
3 been asked to do?

4 A. But they are not. That's the point.
5 The respondents make decisions and live all day
6 on the left-hand side of the spider web. They
7 are asked to make aggregate judgments on the
8 right-hand side. So they are not familiar with
9 the kind of judgment.

10 If the questions asked about programs
11 or specific signals or even, as the Canadian
12 Claimant study does, categories or programs
13 within signal, that might be a little bit
14 easier.

15 But this is just impossible because
16 there's the aggregation element. There is the
17 separation, the transmission through the spider
18 web, and then the aggregation on the right-hand
19 side.

20 And this is a very, very unfamiliar
21 judgment to the respondents. I have not read
22 anything in the record or in the rebuttal
23 testimonies to me that talked about this being
24 a judgment that people make.

25 I have read testimony that said that,

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1 yes, people make judgments about categories,
2 but not in this manner. Not in this manner.

3 Q. Okay.

4 A. There is an example that I use with my
5 students that I think might be very
6 illustrative.

7 Q. Sure.

8 A. So if I were to stand up and ask you
9 how tall I am, you probably would be pretty
10 close. I am about 5-10. So you would probably
11 be pretty close. You would be within an inch,
12 inch and a half, something like that.

13 But if I stood up and asked you how
14 long my leg was, that would be a pretty hard
15 judgment to make. All right? Because it is
16 not something you have ever done before or you
17 are not used to and it doesn't happen very
18 often.

19 And things that are less familiar are
20 -- the judgments are less valid and less
21 reliable. It gets even worse when you have to
22 aggregate, as you have to on the right-hand
23 side of this picture.

24 So if I extend that example, if I
25 extend that task to the following: If I stand

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1 up -- and I do this in class all the time, and
2 it never fails to work -- I stand up. I ask
3 students to write down the length of -- or the
4 distance from the floor to my hip, from my hip
5 to my lower armpit, from my armpit to where my
6 chin projects, from my chin to the top of my
7 head.

8 I ask them to write down those five
9 elements. And then I ask them how tall I am.
10 And the last thing I ask them to do is to add
11 up those five elements.

12 You know, from a lot of my -- the
13 responses my students have given, I should have
14 had a professional basketball career. It is
15 not unusual for me to be eight feet tall when
16 you add them up.

17 It is also -- it is less common but it
18 is not rare for me to be below five feet also.
19 All right? So aggregation of unfamiliar
20 judgments creates a huge problem in the
21 validity. And that's what's going on here.

22 Q. Okay. I want to ask, is there a
23 general theory as to how survey respondents
24 answer complex questions?

25 A. Yes, it's called satisficing.

3298

1 Q. And what is that?

2 A. It is well established that survey
3 respondents in general are not willing to put
4 in the enormous work that would often be
5 required in very difficult -- to answer very
6 difficult questions.

7 You can imagine, you know, when you
8 get a telephone survey at home, if the
9 questions aren't simple, you are out of there.

10 So what survey respondents do -- and
11 it gets worse the more complicated the question
12 is -- is they take shortcuts, sometimes called
13 heuristics, in order to create a defensible way
14 to answer any given question.

15 The more complicated the question, the
16 more likely they are to use heuristics and
17 shortcuts. And shortcuts and heuristics are
18 known to be notoriously unreliable ways of
19 making judgments.

20 And the Princeton psychologist, Daniel
21 Kahneman, won a Nobel Prize largely for showing
22 that, that that's what people do and they often
23 make suboptimal decisions because of that.

24 Q. Okay. Now, you implied earlier that
25 the complexity -- the complexity -- the

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<p>1 complexity is compounded by the fact that this 2 survey is done by telephone. 3 Could you please elaborate on that? 4 A. Yes. As complicated as this is, doing 5 it over a telephone makes it worse. And there 6 are two reasons or there are at least two 7 reasons or there are two outstanding reasons. 8 Number 1 is respondents are less 9 engaged over a telephone. It is much easier to 10 hang up on someone than it is to walk away from 11 them when you are having a face-to-face 12 exchange of questions and answers. That's 13 Number 1. 14 And, Number 2, if you do it 15 face-to-face, and if this interview were 16 conducted face-to-face, or even on-line, the 17 respondents would have in front of them or 18 could have in front of them the signals, a list 19 of the signals that they had to deal with, and 20 the list of the categories that they had to 21 answer about, instead of going back and forth, 22 back and forth. 23 The visual aid would help structure 24 thinking a little bit. I am not sure the 25 survey would be much better, but the problems</p>	<p>1 methods for deciding what an appropriate sample 2 size is, but those methods involve statistical 3 calculations that are too hard for them to do 4 on the fly. They are not too hard for them to 5 do, but they can be done on the fly. 6 And one of the things that has been 7 traditionally found is when you examine the 8 sample sizes that Ph.D. psychologists -- and 9 this was done on the Stanford psychology 10 faculty, so that's a pretty good set of Ph.D. 11 psychologists, I would presume -- that their 12 sample sizes were traditionally -- were 13 consistently too small relative to the optimal. 14 And they were using the heuristic of I 15 will use as my sample what's available in my 16 classroom, something like that. So that's one 17 study. 18 There is another study on surgeons. 19 Should I describe it? Okay. There is another 20 study on surgeons where a surgeon is asked 21 based on the mortality rate of patients that 22 are admitted into their hospital. 23 So there are various different types 24 of surgeons. There are plastic surgeons. 25 There are neurosurgeons. There are cancer</p>
3300	3302
<p>1 with the study are exacerbated by the fact that 2 it is done over the telephone. 3 JUDGE STRICKLER: Professor, does the 4 quality of an answer that is based on 5 heuristics being employed by the respondent 6 vary depending on the expertise of the person 7 who is responding, in other words, people with 8 better information make better decisions based 9 on heuristics than people from the -- being 10 asked questions from the common population? 11 THE WITNESS: I am glad you asked that 12 and the answer is no. Okay? And if I may, I 13 will tell you about a couple of studies that 14 are in the literature, or maybe if I do one and 15 you tell me if you want to hear the second. 16 There was a study made -- one of the 17 things that scientists do, or social 18 scientists, psychologists in particular, is 19 they conduct a lot of experiments and they 20 choose a sample size. 21 Psychologists are pretty educated 22 people. We're talking about academic 23 psychologists, Ph.D. level psychologists. 24 They are pretty educated on how to 25 choose a sample size, well, on -- on the</p>	<p>1 surgeons, et cetera. And the study found that 2 the mortality rate estimates given by the 3 surgeons varied greatly depending on the 4 specialty. 5 So each specialty uses a different 6 heuristic. So how do you define expertise in 7 that sense? They are all surgeons. Right? So 8 expertise would have to be a more uniformly 9 consistent construct. 10 So those are two studies that come to 11 mind. 12 JUDGE STRICKLER: Thank you. 13 BY MR. OLANIRAN: 14 Q. Given your experience as a survey 15 researcher and given your understanding of the 16 objective of this proceeding, are there better 17 approaches to measuring relative market value 18 of programming -- of the programming at issue 19 in this proceeding? 20 A. Well, I'm a survey researcher, but I'm 21 more -- I'm also a social scientist. And I 22 don't believe that all I have is a hammer and 23 every problem is a nail. 24 So I think I have studied enough 25 economics and psychology to believe in the</p>

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<p>1 dictum that actions speak louder than words. 2 And economists have their theory of revealed 3 preference and their principles of revealed 4 preference. 5 So I think you can get a lot more 6 reliable and valid information many times on 7 what people do more than what they say. 8 MR. LAANE: I just -- I am not 9 objecting yet. I just want to make sure we 10 don't get into areas beyond what's in his 11 written testimony, because he has a couple 12 sentences where he talks about alternatives but 13 he goes no further than that. 14 JUDGE BARNETT: So you are not 15 objecting. You are just warning? 16 MR. LAANE: That's right. 17 THE WITNESS: He is just warning I 18 should watch what I say. 19 (Laughter.) 20 JUDGE BARNETT: Go ahead, Mr. 21 Olaniran. I don't think warning is a trial 22 technique that I'm aware of. 23 MR. OLANIRAN: I also wanted to sort 24 of bring to your attention, it's 11:55. And I 25 have about another half an hour. If that's</p>	<p>1 AFTERNOON SESSION 2 (1:00 p.m.) 3 JUDGE BARNETT: Please be seated. 4 Mr. Garrett? 5 MR. GARRETT: I do have a housekeeping 6 matter for this afternoon, Your Honor. 7 JUDGE BARNETT: All right. 8 MR. GARRETT: We request that we be 9 given the opportunity to mark portions of this 10 morning's discussion concerning Ms. Berlin as 11 restricted material. We would be happy to try 12 to limit it to as little as possible, but 13 before this all goes out over the Internet or 14 whatever, we'd like the opportunity to review 15 the statements and decide which materials 16 should be considered restricted. 17 JUDGE BARNETT: That's acceptable. 18 We're trying to avoid this after-the-fact 19 editing of transcripts, but under these 20 circumstances, I think it's probably 21 appropriate to do so. 22 We are not uploading the transcripts 23 at this point. We've decided to wait until the 24 end of the proceedings. So you may do that. 25 I suppose the best way is to</p>
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<p>1 okay, I will gladly continue, or -- 2 JUDGE BARNETT: Is this a good 3 breaking point? 4 MR. OLANIRAN: Yes. 5 JUDGE BARNETT: Okay. Then why don't 6 we take our break. We will be at recess until 7 12:55. 8 MR. OLANIRAN: Thank you, Your Honor. 9 (Whereupon, at 11:56 a.m., a lunch recess was 10 taken.) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 communicate with the court reporter, the court 2 reporter will contact us to get approval, and 3 we'll go from there. 4 MR. GARRETT: That's fine, Your Honor, 5 we will keep it to a minimum. I promise. 6 JUDGE BARNETT: Thank you. Thank you 7 very much. 8 Mr. Olaniran? 9 MR. OLANIRAN: Yes, Your Honor. 10 BY MR. OLANIRAN: 11 Q. Dr. Steckel, I want to now turn to 12 your written rebuttal testimony. And that 13 would be Exhibit 6015, correct? 14 A. Correct. 15 Q. Now, at a very high level, what were 16 you asked to do for purposes of your written 17 rebuttal testimony? 18 A. As everybody knows, the Bortz survey 19 was updated between '04-'05 and 2010 to 2013. 20 I was asked to render an opinion as to whether 21 the newer version of the Bortz survey 22 alleviated my concerns about the earlier 23 version of the Bortz survey. I was further 24 asked to examine Dr. Nancy Mathiowetz's 25 testimony and see if that changed my views at</p>

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<p>1 all.</p> <p>2 And, finally, I was asked to look at</p> <p>3 the survey submitted by the Canadian Claimants</p> <p>4 to see if that made any difference as to how I</p> <p>5 felt about the Bortz survey.</p> <p>6 Q. Did you also have an opportunity to</p> <p>7 review the rebuttal testimony of other</p> <p>8 witnesses, in particular the ones that address</p> <p>9 some of your testimony?</p> <p>10 A. I did. But I didn't do that before</p> <p>11 this September 15th, 2017.</p> <p>12 Q. Let's first start -- discuss your</p> <p>13 analysis of whether the changes to the Bortz</p> <p>14 survey submitted for the -- for this proceeding</p> <p>15 alleviate your concerns about -- about the</p> <p>16 survey. And having just gone through your</p> <p>17 opinion about the survey itself, I just want to</p> <p>18 limit the discussion to the changes that were</p> <p>19 made and your opinions about those changes.</p> <p>20 And, again, just to make the record</p> <p>21 clear, the discussion we just had with respect</p> <p>22 to the Bortz survey, you were addressing the</p> <p>23 2010 through 2013 Bortz survey, correct?</p> <p>24 A. Correct.</p> <p>25 Q. And also the -- and it's the 2010</p>	<p>1 I'll start with the first one, the</p> <p>2 identification and inclusion of compensable</p> <p>3 programming on WGN. And that's certainly a</p> <p>4 step in the right direction, but as I</p> <p>5 understand, this step was only included on --</p> <p>6 for cable systems that -- for which the only</p> <p>7 distantly transmitted signal was the WGN</p> <p>8 signal. And that was fewer than half of the</p> <p>9 signals that incorporated WGN.</p> <p>10 So a step in the right direction, but</p> <p>11 still a drop in the bucket, perhaps.</p> <p>12 Q. What about reducing large number of</p> <p>13 distant signals that Bortz did?</p> <p>14 A. Well, the new version of the Bortz</p> <p>15 study capped it at eight, the number of distant</p> <p>16 signals. Before lunch, I presented a</p> <p>17 demonstrative that showed how complicated a</p> <p>18 spider web would ensue when there were only</p> <p>19 four.</p> <p>20 So capping it at eight, I don't see as</p> <p>21 a meaningful improvement at all. It's still</p> <p>22 going to be complicated.</p> <p>23 Q. What about elimination of sports</p> <p>24 programming questions on some questionnaires?</p> <p>25 A. Well, as I understand and recall, that</p>
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<p>1 through 2013 questionnaire that's revised from</p> <p>2 '04-'05 questionnaire, correct, for Bortz?</p> <p>3 A. That's my understanding.</p> <p>4 Q. And it's, in fact, the '04-'05 Bortz</p> <p>5 questionnaire that was the basis from which the</p> <p>6 Horowitz -- Mr. Horowitz started his 2010</p> <p>7 through '13 survey, correct?</p> <p>8 A. That's what I understand to be the</p> <p>9 case.</p> <p>10 Q. Okay. And the discussion we're about</p> <p>11 to have now, again, is about the improvement</p> <p>12 between '04-'05 and 2010-'13 of the Bortz</p> <p>13 survey that's being presented in this</p> <p>14 proceeding?</p> <p>15 A. All right.</p> <p>16 Q. Okay. And what changes reflected in</p> <p>17 the 2010 through '13 Bortz survey questionnaire</p> <p>18 did you evaluate?</p> <p>19 A. Well, I think we -- I think I have a</p> <p>20 demonstrative that lists them.</p> <p>21 Q. Can we have that up? There we go.</p> <p>22 And could you walk us through the</p> <p>23 changes that you evaluated?</p> <p>24 A. Certainly. So there were six bullet</p> <p>25 points on this slide, on this demonstrative, so</p>	<p>1 was done just for signals that did not have any</p> <p>2 sports transmissions. And I suppose that's a</p> <p>3 small step in the right direction as well.</p> <p>4 Q. And what about with respect to the</p> <p>5 better coverage through stratified sampling?</p> <p>6 A. That may be true, but it has nothing</p> <p>7 to do with what Bortz did. It has to do with</p> <p>8 the consolidation of the industry. The</p> <p>9 sampling methods were the same as I understand</p> <p>10 them in '04-'05 and 2010 to '13.</p> <p>11 Q. And what is your view with regard to</p> <p>12 the changing survey's in -- the changing of the</p> <p>13 survey's introductory questions?</p> <p>14 A. If it's all right with you,</p> <p>15 Mr. Olaniran, I'd rather save that to last.</p> <p>16 Q. Okay.</p> <p>17 A. I'd rather do the last bullet point</p> <p>18 before that.</p> <p>19 Q. Okay. Then let's move to removing the</p> <p>20 phrase "attracting and retaining subscribers"</p> <p>21 from the constant sum question.</p> <p>22 A. I'm not sure what impact that would</p> <p>23 have and why that was done. After all, value</p> <p>24 is derived from the attraction and retaining of</p> <p>25 subscribers. Even beyond subscription fees,</p>

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<p>1 even things such as advertising fees are 2 dependent on a cable system's ability to 3 attract and retain subscribers. 4 So I don't know what other value -- 5 where else value comes from, at least in a 6 primitive sense, than attracting and retaining 7 subscribers. So I'm not sure what good that 8 would do. 9 Q. Now, with respect to the changes made 10 to the introductory questions. 11 A. Yeah, that's a very interesting one 12 because I know Bortz contends -- and, you know, 13 Horowitz put in warm-up questions too to get 14 respondents in an appropriate mood to answer 15 questions. And I under that to be Bortz's 16 purpose too. 17 But, actually, these introductory 18 questions provide strong evidence of the lack 19 of construct validity for the constant sum 20 money question. 21 Q. And what do you mean by that? 22 A. Well, I have an analysis that was done 23 in my rebuttal report, Exhibit 200 -- no, I'm 24 sorry, Exhibit 6015, pages -- or what page was 25 it on, I'm sorry?</p>	<p>1 see at the bottom that the respondent is 2 supposed to give the ranks, what is the highest 3 cost, second highest cost, third, et cetera, 4 going down to sixth. If you go down to four 5 now, the only difference is that you're 6 supposed to allocate 100 points. It's a 7 constant sum. But those allocations should be 8 in the same order as the ranking from Question 9 3 because they're essentially asking the same 10 question and the only difference is one is what 11 we call an ordinal scale and one is what we 12 call a ratio scale. 13 So there's more quantitative 14 information, but the order of the -- the order 15 -- the rank order of the alternatives in 16 Question 4a should be the same, exactly the 17 same, as in Question 3. And so what I decided 18 to do or what I set out to do was explore the 19 extent to which that was actually true. 20 Q. And -- 21 A. And so now we can go back to page 19 22 of 6015. 23 JUDGE STRICKLER: I have a question 24 for you, sir, before you get to that, with 25 regard to your testimony that you think</p>
3312	3314
<p>1 Q. That would be page, I think, 19? 2 A. Yes, it's on page 19. But before we 3 look at the table on page 19, I would like to 4 look at the questionnaire again. 5 Q. Okay. Can you bring up the B-20 on 6 Exhibit 1001? 7 And do you want to start with Question 8 2? 9 A. 3. 10 Q. Question 3, I'm sorry. 11 A. So, Question 3, which is offered as a 12 warm-up question, asks what is the cost ranking 13 for the 2013 or for the year's programming on 14 the stations listed. So it asks to rank these 15 in terms of how much was paid. 16 So if we go to Question 4, Question 4 17 is what percentage of a fixed dollar amount 18 would your system have spent? To me those 19 sound like the same question. 20 What was the cost and how much did you 21 spend or would you have spent? So if those are 22 the same question, then the information should 23 be very closely related. And the information 24 is related but not as strongly as it should be. 25 If we go back to Question 3, you can</p>	<p>1 Questions 3 and 4 are asking for the same 2 information. 3 Would you not also consider the 4 possibility that Question 3 could be construed 5 as to what the relative cost is, irrespective 6 of whether you paid the cost? It's a pricing 7 type of question, and Question 4 seems to 8 clearly say -- ask you to determine how much 9 you would have -- you, in fact, would spend, 10 knowing the cost. 11 In other words, I know that -- I can 12 tell you the price of a Tesla, but -- and I can 13 also tell you whether I would pay for it or 14 not, and those are two separate questions, 15 right? 16 THE WITNESS: Well, yes, but I don't 17 think this question is the same as your Tesla 18 example. Can we go back to the questions? 19 Because as I understand, people only 20 ranked or provided the constant sum information 21 on things they actually did buy. 22 JUDGE STRICKLER: I agree with you. 23 That's Question 4. But Question -- are you 24 sure that Question 3 or is it your testimony 25 that Question 3 is also asking them about the</p>

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3315	<p>1 expense of categories that they, in fact, did</p> <p>2 purchase?</p> <p>3 THE WITNESS: Well, you know, that's a</p> <p>4 good point. I understand -- and I understand</p> <p>5 that. And --</p> <p>6 JUDGE STRICKLER: Well, the question</p> <p>7 says --</p> <p>8 THE WITNESS: Right.</p> <p>9 JUDGE STRICKLER: -- "please rank</p> <p>10 these six categories in order of how expensive</p> <p>11 each would have been to your system."</p> <p>12 THE WITNESS: Right. And Question 4</p> <p>13 says --</p> <p>14 JUDGE STRICKLER: Question 4 is a</p> <p>15 constant sum regarding what you would, in fact,</p> <p>16 spend.</p> <p>17 THE WITNESS: Well, you know, yeah,</p> <p>18 there's ambiguity throughout this</p> <p>19 questionnaire. But it's would your system have</p> <p>20 spent. It's the same language.</p> <p>21 Maybe I'm missing your point.</p> <p>22 JUDGE STRICKLER: Well, I don't know</p> <p>23 that you are because when you say there's</p> <p>24 ambiguity throughout, I'm noting another</p> <p>25 interpretation of a distinction between 3 and</p>	3317	<p>1 2010, the 2010 row, and explain what those</p> <p>2 numbers mean.</p> <p>3 A. Right. So if -- so 2010, I was</p> <p>4 provided with a spreadsheet of 163 respondents.</p> <p>5 And I examined, under at least my presumption,</p> <p>6 which Your Honor has posted -- you know, may</p> <p>7 have some wiggle room because of ambiguity in</p> <p>8 the question, but ambiguity infects the</p> <p>9 questionnaire anyway. And if it's ambiguous,</p> <p>10 then it still lacks construct validity.</p> <p>11 So, you know, ambiguity aside. So</p> <p>12 let's say that there is no ambiguity. This</p> <p>13 analysis would be the case if there is no</p> <p>14 ambiguity. If there is ambiguity, then</p> <p>15 questions are ambiguous and are not reliable or</p> <p>16 valid in and of themselves. So -- regardless.</p> <p>17 So under the presumption that there</p> <p>18 should be perfect correlation between the rank</p> <p>19 order in Question 3 and the rank order in</p> <p>20 Question 4, well, the data in 2010 failed</p> <p>21 miserably. Only 13 of the 163 respondents had</p> <p>22 perfect correlations.</p> <p>23 One of them, one respondent had a</p> <p>24 correlation as low as .36. Even if I didn't</p> <p>25 have a standard of perfect correlation, if the</p>
3316	<p>1 4, rather than equating them, but I'm not</p> <p>2 disagreeing with you, in my question anyway,</p> <p>3 with regard to whether or not there's ambiguity</p> <p>4 there. I don't know if there's anything else</p> <p>5 you wanted to add or not.</p> <p>6 THE WITNESS: Yeah, I think it's "cost</p> <p>7 would have been," "would you have spent." You</p> <p>8 know, there's ambiguity throughout. And it's</p> <p>9 an interesting wrinkle -- I'll be honest, I</p> <p>10 hadn't thought of it -- but the language is the</p> <p>11 same.</p> <p>12 BY MR. OLANIRAN:</p> <p>13 Q. Now, you were -- you made comparisons</p> <p>14 between Question 3 and Question 4. And I think</p> <p>15 you directed us to page 19 of your testimony.</p> <p>16 A. I did direct you to page 19.</p> <p>17 Q. Okay. Could you explain your analysis</p> <p>18 on page 19?</p> <p>19 A. So what was done on page 19, the table</p> <p>20 on page 19 reflects the analysis of performing</p> <p>21 the rank correlations between the responses to</p> <p>22 Question 3 and Question 4 for each of the</p> <p>23 respondents that were provided to me, that were</p> <p>24 available.</p> <p>25 Q. Could you please take -- let's take</p>	3318	<p>1 standard was a correlation of .9, 64 of them</p> <p>2 failed that cutoff.</p> <p>3 So one of the things that I think is</p> <p>4 clear -- and I make similar comments about</p> <p>5 2011, '12, and '13, so let me go to the table,</p> <p>6 the total table, the total line.</p> <p>7 Out of 654 respondents across all</p> <p>8 years, about half of them had correlations less</p> <p>9 than .9. Some of the people and some in every</p> <p>10 year had correlations that were clearly</p> <p>11 relatively low and lower than you would expect,</p> <p>12 unless respondents were thinking entirely</p> <p>13 different things between Question 3 and</p> <p>14 Question 4, which is hard for me to imagine</p> <p>15 based on the language of the two questions.</p> <p>16 Q. And just setting aside your</p> <p>17 reservations about surveys in general as used</p> <p>18 in this proceeding, do you have an opinion as</p> <p>19 to how the -- well, strike that.</p> <p>20 Well, do any of the changes that were</p> <p>21 made to Bortz, the Bortz survey as reflected in</p> <p>22 the 2010 through '13, did they change your</p> <p>23 concerns about the Bortz surveys?</p> <p>24 A. No.</p> <p>25 Q. And why not?</p>

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<p style="text-align: right;">3319</p> <p>1 A. Well, two reasons. The two big 2 reasons I gave this morning about why I don't 3 think the Bortz survey is of any usefulness in 4 this context. And one is lack of construct 5 validity. And none of the changes address 6 construct validity. And the spider web, the 7 difficulty in responding. 8 The spider web, coupled with the 9 aggregation at the end, none of the changes 10 impact that. 11 Q. And so setting aside your reservations 12 about surveys, as used in this proceeding, do 13 you have an opinion as to the 2010-'13 Bortz 14 survey versus the Horowitz -- the 2010 through 15 '13 Horowitz surveys? 16 A. Well, I do. But, as I said earlier, I 17 don't think either of them are great. At least 18 if you take those two big classes of problems, 19 at least the Horowitz survey does something to 20 help the respondents navigate through the 21 spider web. 22 It still has the construct validity 23 issue, but the spider web is a little bit 24 easier to navigate through because of the 25 changes it made with constant reminding. The</p>	<p style="text-align: right;">3321</p> <p>1 earlier cases, it has to be correct. She does 2 no independent analysis of her own. And the 3 little literature that she refers to, she 4 mischaracterizes or -- or cites in an 5 incomplete fashion. 6 Q. And so you're aware that 7 Dr. Mathiowetz also disagrees with some of your 8 assertions in her -- in her testimony, right? 9 A. I think she disagrees with almost all 10 of my assertions. 11 Q. Do you recall Dr. Mathiowetz asserting 12 that the new introductory questions in the 2010 13 through '13 Bortz survey questionnaire are 14 useful primers for the money, the constant sum 15 question? 16 A. I recall that she said that. 17 Q. And what is your response to that? I 18 think you just talked a little bit about that. 19 A. Right. Well, first of all, it's not 20 true based on the analysis I just presented. 21 And, second, I have two words to -- to respond 22 to that with: Spider web. 23 I mean, those questions do nothing to 24 make the spider web easier to transverse. 25 Q. Dr. Mathiowetz also states that the</p>
<p style="text-align: right;">3320</p> <p>1 constantly reminding the respondents of the 2 stations and the issues -- and -- that they had 3 to deal with and providing examples of the 4 types of programming made things a little bit 5 easier, but still not good. 6 Q. Now let's turn to your written 7 rebuttal with respect to Dr. Mathiowetz's 8 testimony. Now, what is your general 9 understanding of Dr. Mathiowetz opinion of the 10 2010 through '13 Bortz survey? 11 A. Well, I think she endorses it. She 12 essentially gives it her seal of approval. And 13 she endorses the changes that were made as 14 things that could only help. 15 Q. Okay. And does her testimony give you 16 confidence about the 2010 through '13 Bortz 17 survey? 18 A. None at all. 19 Q. Why not? 20 A. Well, because the vast majority of her 21 testimony is -- does not have an analytic base. 22 Q. What do you mean by that? 23 A. She quotes a lot of the opinions in 24 prior proceedings and essentially generates the 25 impression that because this was done in</p>	<p style="text-align: right;">3322</p> <p>1 questions in the Bortz questionnaire are clear, 2 precise, and unbiased. 3 Do you agree with that? 4 A. No, I don't. 5 Q. Why not? 6 A. Same two words: Spider web. How can 7 anything that's so complicated be so clear? 8 That's a rhetorical question. He looked like 9 he was about to answer. 10 (Laughter.) 11 BY MR. OLANIRAN: 12 Q. I don't think that's allowed. 13 Dr. Mathiowetz also disagrees with your opinion 14 that the Bortz and Horowitz surveys do not 15 address the relevant question of interest in 16 this proceeding. 17 And what is your response to that? 18 A. You know, that's a question which -- 19 that's an opinion in which she simply quoted, 20 as I recall, past opinions, as if they were 21 gospel and written in stone. And I guess, you 22 know, that's not -- as a scientist, I think she 23 and I are trained not to do that. 24 We're trained always to be able to -- 25 to be able to always question the written state</p>

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<p style="text-align: right;">3323</p> <p>1 of the art. Otherwise, if we don't do that, we 2 make no progress. 3 She presented no independent analysis 4 or justification that prevents me from 5 believing that the two bridges that have to be 6 crossed from the statutory requirement of 7 relative marketplace value to the constant sum 8 question, those two bridges that I talked about 9 this morning, can be crossed. She presents no 10 evidence other than what I like to say is 11 sometimes because she says so. 12 Q. Okay. Can we pull up Exhibit 1007. 13 And look at pages -- paragraph 11, 14 which carries over to -- paragraphs 11, 10 -- I 15 guess paragraph 10 through 12. Could you take 16 a look at those paragraphs? 17 A. And 12? I'm sorry. She even admits 18 in the first sentence of 12, "based on the 19 historical comments of." She presents nothing 20 independent to support that. 21 Q. Are you referring to the sentence 22 where she says "based on the historical 23 comments of CRJ's, CARP, the Librarian, and the 24 court of appeals -- 25 A. Yes.</p>	<p style="text-align: right;">3325</p> <p>1 give a specific citation -- on page 8 of the 2 paper that he wrote that is in the record of 3 prior proceedings does not recommend constant 4 sum questions be used over the telephone. 5 Q. Now, I want to switch to the rebuttal 6 testimony of Dr. Israel who testified on behalf 7 of the Joint Sports Claimants. 8 Do you recall reading that? 9 A. I do. 10 Q. Okay. Can we pull up Exhibit 1004, 11 please. And can we go to page 29, paragraph 12 55. 13 Have you had a chance to review that? 14 A. If you'll give me a second. 15 Q. Sure. 16 A. Okay. 17 Q. And this paragraph 55 is where 18 Dr. Israel disagrees with your assertion that 19 cable executives would be unable to respond 20 accurately to the Bortz survey because they 21 don't make decisions about individual programs 22 or the various program categories employed in 23 this proceeding. 24 And -- do you see that? 25 A. Yes, I do.</p>
<p style="text-align: right;">3324</p> <p>1 Q. -- it appears that both the Bortz and 2 Horowitz surveys, by focusing on the relative 3 valuation placed on program categories by cable 4 system operators are, in fact, addressing the 5 relevant question of interest. 6 A. And I just don't believe that's right. 7 Q. Okay. Dr. Mathiowetz also states that 8 the constant sum -- your criticism of the 9 constant sum questions are unfounded. What's 10 your response to that? 11 A. Well, I -- as you've heard all morning 12 and so far today, I have lots of criticisms of 13 the constant sum question. But the fact that 14 it's a constant sum question in general, while 15 I -- you know, there are certain cases in which 16 it's useful, it's just not useful here. 17 The report in her testimony, as I 18 remember, she points to historical testimony of 19 a Professor Reid, a Mr. Axelrod, et cetera, 20 that's 50 years old and does not address the 21 use -- and none -- none of what she points to 22 and none of the research she points to of 23 Mr. Axelrod addressed the use of constant sum 24 questions in a case like this. 25 And, indeed, Mr. Axelrod -- and I will</p>	<p style="text-align: right;">3326</p> <p>1 Q. And what is your response to his 2 disagreement with that assertion? 3 A. That I think he's -- I think he's 4 wrong. 5 Q. And why do you say that? 6 A. And I think he -- this is another case 7 where it's a "because I said so" type of 8 opinion. 9 And I want to point to paragraph 56 10 where he, himself, says, "in my own work, I 11 interact with both cable executives and content 12 providers regularly. Their discussion about 13 what certain networks are worth -- both how 14 cable executives market them and how networks 15 market themselves -- are all about breaking 16 down the value of the underlying content." 17 So even according to his own 18 statement, the experience that he has, that 19 he's pointing to, relates to cable network 20 executives evaluating the left-hand side of the 21 spider web. He says nothing about them 22 continually making decisions and judgments 23 about evaluating the right-hand side of the 24 spider web, which is what the Bortz 25 questionnaire is asking respondents to do.</p>

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<p>1 JUDGE BARNETT: Mr. Dove?</p> <p>2 MR. DOVE: Your Honor, nothing with</p> <p>3 regard to the testimony, but the exhibit we're</p> <p>4 on is Exhibit 1004. I believe it should be --</p> <p>5 that's one that was not admitted in these</p> <p>6 proceedings, and I believe he should be at</p> <p>7 1087, just for the record.</p> <p>8 JUDGE BARNETT: Thank you, Mr. Dove.</p> <p>9 MR. OLANIRAN: Thank you for the</p> <p>10 correction.</p> <p>11 BY MR. OLANIRAN:</p> <p>12 Q. Could you just review paragraphs 55</p> <p>13 and 56 of 1087 to make sure that there's no</p> <p>14 difference in the text that you just discussed</p> <p>15 versus what's -- what's in this, these two</p> <p>16 paragraphs of 1087?</p> <p>17 A. No, that's what I just read.</p> <p>18 Q. Thank you. And I forgot, you were in</p> <p>19 paragraph 56 and discussing Dr. Israel's own</p> <p>20 words.</p> <p>21 A. Yeah. And his own words even say that</p> <p>22 the executives that he deals with are making</p> <p>23 decisions and judgments about the left-hand</p> <p>24 side of the spider web. But yet the Bortz</p> <p>25 questionnaire is asking people to make</p>	<p>1 signal could have multiple programs that go</p> <p>2 into the same category. I suppose that's</p> <p>3 possible too. So --</p> <p>4 JUDGE STRICKLER: And as -- as she's</p> <p>5 apparently testifying here --</p> <p>6 THE WITNESS: He.</p> <p>7 JUDGE STRICKLER: He, I'm sorry. I</p> <p>8 apologize. That these are -- that TBS has to</p> <p>9 look at all different types of categories,</p> <p>10 sports, syndicated shows, movies, whatever else</p> <p>11 they have on, local news, if that's there as</p> <p>12 well, so they do have to go to the right-hand</p> <p>13 column, but they don't have to do the mental</p> <p>14 gymnastics of doing it across all the different</p> <p>15 stations; they only have to do it with regard</p> <p>16 to TBS?</p> <p>17 THE WITNESS: No, that's right.</p> <p>18 That's right.</p> <p>19 JUDGE STRICKLER: Thank you.</p> <p>20 BY MR. OLANIRAN:</p> <p>21 Q. And also let's turn to paragraph --</p> <p>22 excuse me one second -- paragraphs 57 and 58 on</p> <p>23 page -- I think it's page 29 -- is that</p> <p>24 right -- of Exhibit 1087. Page 30, I'm sorry.</p> <p>25 JUDGE STRICKLER: Which paragraph?</p>
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<p>1 judgments about the right-hand side of the</p> <p>2 spider web.</p> <p>3 JUDGE STRICKLER: Isn't paragraph 56</p> <p>4 talking about the left- and the right-hand side</p> <p>5 but just only for one -- one row of the</p> <p>6 left-hand side at a time; in other words, if it</p> <p>7 was TBS or TNT executives, they would have to</p> <p>8 decide, or a regional sports network, an RSN,</p> <p>9 they would have to decide the value of</p> <p>10 different categories of programming, but you</p> <p>11 wouldn't have the web because you wouldn't have</p> <p>12 all the different connections that you've</p> <p>13 testified make things so confusing? You could</p> <p>14 be on the left-hand side and be an RSN, and</p> <p>15 then you say I have regional sports, I have --</p> <p>16 I think it's called filler programming in this</p> <p>17 testimony. So you are going across, but you're</p> <p>18 only going across one row on the left to cover</p> <p>19 everything in the column on the right?</p> <p>20 THE WITNESS: I think what you're</p> <p>21 saying, and that would be one way to interpret</p> <p>22 it, but I guess I -- I think it's the same</p> <p>23 thing. If you look at it one category at a</p> <p>24 time, then if you look at the specific</p> <p>25 programs, then they map -- well, I suppose each</p>	<p>1 MR. OLANIRAN: Paragraphs 57 and 58 on</p> <p>2 Exhibit 1087. And that's page 30.</p> <p>3 BY MR. OLANIRAN:</p> <p>4 Q. Have you had a chance to review that?</p> <p>5 A. Yes, but if you will give me a moment.</p> <p>6 Q. Sure.</p> <p>7 A. Yeah.</p> <p>8 Q. And what is Dr. Israel's criticism in</p> <p>9 these two paragraphs with regards to your</p> <p>10 testimony?</p> <p>11 A. Well, I'm not sure what his criticism</p> <p>12 is apart from the headline to -- under point 3</p> <p>13 where it says "Dr. Steckel's discussion of</p> <p>14 marginal versus total values is incorrect."</p> <p>15 I think this is extremely</p> <p>16 disingenuous, in particular, since he puts the</p> <p>17 terms "marginal return" in quotes. That's not</p> <p>18 a phrase I used anywhere in my testimony. And</p> <p>19 he's quoting me as saying something I didn't</p> <p>20 say.</p> <p>21 JUDGE STRICKLER: You used the phrase</p> <p>22 -- the word "incremental."</p> <p>23 THE WITNESS: I used the word</p> <p>24 "incremental."</p> <p>25 JUDGE STRICKLER: And you're</p>

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<p>3331</p> <p>1 distinguishing that that from "marginal"? 2 THE WITNESS: But I also did not say 3 value created by one more minute of 4 programming. It's incremental per hundred 5 dollars, per hundred dollar investment. That 6 was my analysis. Right? 7 And I -- I want to point to the -- to 8 the fact that he uses different language that I 9 did and doesn't address my example at all, 10 doesn't question my example at all or the 11 model, the stylized example I presented this 12 morning. 13 I did not look at value created by one 14 more minute, and what he says I argue -- 15 Dr. Steckel argues that the Bortz survey 16 captures only the marginal return of each 17 category -- I think as is clear from my 18 testimony this morning, I don't know what the 19 Bortz survey captures. 20 So I certainly don't argue that it 21 captures the marginal return, the value created 22 by one more minute of programming. He has 23 co-opted my report into his own language and 24 his own view of what he wants it to read. And 25 I think that's extremely disingenuous.</p>	<p>3333</p> <p>1 Your Honor had asked a few minutes ago. If you 2 look at it one at a time, it makes the spider 3 web much less dense. 4 Q. And as between the Canadian study 5 compared to the Bortz, what is your opinion? 6 A. Well, I think the Canadian study even 7 goes farther than Horowitz in trying to 8 simplify the spider web. It also has another 9 improvement. Although the word "value" is 10 ambiguous, it's at least consistent in the 11 money question. 12 It asks for relative value, and then 13 it asks the respondent to allocate 100 points 14 according to value, not according to how much 15 they would have spent. So at least there's a 16 consistency improvement, although there's still 17 ambiguity in the term, and it simplifies the 18 task to the respondent by asking one signal at 19 a time. 20 MR. OLANIRAN: I have no further 21 questions, Your Honor. Thank you, Dr. Steckel. 22 THE WITNESS: Thank you, Mr. Olaniran. 23 JUDGE BARNETT: Thank you, 24 Mr. Olaniran. 25 Additional cross-examination? Excuse</p>
<p>3332</p> <p>1 BY MR. OLANIRAN: 2 Q. Now let's move to the Canadian -- your 3 views on the Canadian survey methodology. 4 What is your understanding of the 5 objectives of the Canadian study? 6 A. The Canadian Claimants' survey, as I 7 understand it, had two objectives: To find the 8 relative -- to find the value of Canadian 9 programming rebroadcast on distant signals and 10 to find out the value or the relative -- the 11 importance is the word they use -- the 12 importance of the specific types of programming 13 on very specific types of stations, 14 super-stations, independent stations, et 15 cetera. 16 Q. Okay. And what's your understanding 17 of the survey methodology employed for the 18 Canadian Claimants? 19 A. It was very similar to the Bortz and 20 Horowitz surveys, as I understand it. There 21 were a couple of differences. One of the 22 differences is that it asks one signal at a 23 time in contrast to Bortz, which asks for all 24 the signals, which I think is a great 25 improvement, consistent with the question that</p>	<p>3334</p> <p>1 me, cross-examination. 2 MR. LAANE: Yes, Your Honor. 3 JUDGE BARNETT: Let's start with the 4 first one. 5 CROSS-EXAMINATION 6 BY MR. LAANE: 7 Q. Good afternoon, Dr. Steckel. 8 A. Good afternoon. 9 Q. I'm Sean Laane. I'm here representing 10 the Joint Sports Claimants. 11 A. Pleasure to meet you. 12 Q. You spent most of your time studying 13 marketing strategy and marketing research, 14 right? 15 A. Most of my time over the last 30 some 16 odd years, yes. 17 Q. Okay. With a focus on research on 18 consumers, right? 19 A. No, actually. If you see a lot of my 20 work, if you take a look at my CV, a lot of it 21 is on how managers make decisions. 22 Q. You said at page 2 in your written 23 direct testimony that you have been involved in 24 hundreds of consumer surveys, right? 25 A. That's right.</p>

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1 Q. So would you say the majority of your
2 survey work has been on consumer surveys?
3 A. I think that's fair.
4 Q. And have you ever designed, conducted,
5 or supervised a survey of executives in the
6 cable television industry?
7 A. No.
8 Q. Okay. Have you ever worked in the
9 cable television industry?
10 A. No, not that I recall.
11 Q. I thought that would have been easy to
12 remember, but --
13 A. Well, I interpret -- I interpret the
14 question have I ever done any work for an
15 agency --
16 Q. I see.
17 A. -- in the cable television industry.
18 Q. I see. But you've neither worked for
19 a CSO, nor done consulting work for one that
20 you can recall?
21 A. That's correct.
22 Q. And none of the research publications
23 or presentations listed in your CV relates to
24 the cable television industry, correct?
25 A. I believe that's correct.

3336

1 Q. Okay. And you don't hold yourself out
2 as an expert on how cable system executives
3 make decisions, do you?
4 A. That is correct.
5 Q. Okay. And in terms of your expertise,
6 you're not an economist, right?
7 A. I don't have a degree in economics. I
8 have a working knowledge of some elementary
9 economic principles.
10 Q. But you've testified in courts under
11 oath that you weren't trained as an economist
12 and that you're not an economist, right?
13 A. That's correct.
14 Q. Okay. Now, you told us there were
15 maybe 25 cases you remembered being involved in
16 and you were lumping together trial testimony
17 and things like declarations in support of
18 summary judgment in that number; is that right?
19 A. Where my declaration was cited as part
20 of the summary judgment or denial of class
21 certification.
22 Q. Okay. Was most of that in the motions
23 capacity, not in the trial capacity, most of
24 those 25?
25 A. No, I don't believe so.

3337

1 Q. Okay. Have there been occasions when
2 you have presented a survey to the courts and
3 the courts have found that your methodology
4 didn't pass muster?
5 A. Yes, there have been.
6 Q. Okay. And you talked about doing
7 valuation surveys. Was one of those a
8 valuation survey you did in a case out in
9 California known as Brown, also called In re
10 tobacco cases?
11 A. Yes.
12 Q. Okay. And the trial court in that
13 case rejected a survey you had done for a
14 variety of reasons, right?
15 A. That's correct.
16 Q. Okay. Including that your method of
17 selecting participants was flawed?
18 A. I don't recall that being one of the
19 reasons, but I do remember the trial court
20 piling on.
21 Q. Okay. We can look at it, if you want.
22 You accept my representation it says that in
23 the opinion?
24 A. I have no -- I have no reason to doubt
25 your representation.

3338

1 Q. Okay. And the court found your survey
2 instructions were difficult to understand?
3 A. I have no reason to doubt that
4 representation either.
5 Q. Okay. And the court found the
6 questions were repetitive and complex?
7 A. That's what the court found, although
8 I disagree with the court on at least that one.
9 Q. Okay. And the court concluded that
10 your survey produced nonsensical results?
11 A. That was the court's conclusion.
12 Q. Okay. And in upholding the trial
13 court, the California Court of Appeals quoted
14 the trial judge as saying, "rarely have I ever
15 seen something that was subject to such a
16 multifaceted attack. It just demolished this
17 survey." Correct?
18 A. It was not one of my best days.
19 Q. Okay.
20 A. At least when I read the reports and
21 the opinions was not one of my best days. I --
22 I do disagree with most of the criticisms, but
23 so it goes.
24 Q. All right. Your CV lists Hershey as a
25 past client. And you did a consumer confusion

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3339	<p>1 survey in a case called Hershey versus</p> <p>2 Promotion in Motion, right?</p> <p>3 A. Yes, that's correct.</p> <p>4 Q. Okay. And in that case, did the court</p> <p>5 find "this court does not find Steckel's survey</p> <p>6 results persuasive; much of Steckel's criticism</p> <p>7 of other confusion surveys applies to his own"?</p> <p>8 A. If the court said that, the court said</p> <p>9 that.</p> <p>10 Q. Okay.</p> <p>11 A. I will accept your representation that</p> <p>12 that's what the court said.</p> <p>13 Q. All right. And your prior testimony</p> <p>14 also lists a case in Michigan called Visteon,</p> <p>15 and in that case, I guess the court found your</p> <p>16 survey was not relevant.</p> <p>17 Do you recall that?</p> <p>18 A. Not relevant because it was input to</p> <p>19 an economist's -- to an economist's analysis</p> <p>20 and the economist was Dauberted. Once the</p> <p>21 economist was Dauberted, my work was no longer</p> <p>22 relevant.</p> <p>23 Q. Okay. But did the trial judge also</p> <p>24 note that even if it had been relevant, there</p> <p>25 would have been legitimate challenges to your</p>	3341	<p>1 design a cable subscriber survey for this case?</p> <p>2 A. No, they did not.</p> <p>3 Q. Did you -- in light of your view a</p> <p>4 subscriber survey would be more useful, did you</p> <p>5 recommend that they do a subscriber survey?</p> <p>6 A. I don't make recommendations to</p> <p>7 counsel of new projects.</p> <p>8 Q. Okay.</p> <p>9 A. That was not part of my assignment.</p> <p>10 Q. Do you know if -- if anybody did a</p> <p>11 subscriber survey for the years 2010 through</p> <p>12 '13?</p> <p>13 A. I do not know.</p> <p>14 Q. Okay. And then you also say that</p> <p>15 analysis of market data would be more useful.</p> <p>16 But you don't set forth any market data in your</p> <p>17 testimony, right?</p> <p>18 A. No, I don't.</p> <p>19 Q. Okay. Now, when were you first</p> <p>20 retained in this case?</p> <p>21 A. It has to be, oh, I don't know,</p> <p>22 somewhere two to three years ago.</p> <p>23 Q. Okay. Do you know if you were</p> <p>24 retained before or after the Horowitz survey</p> <p>25 was fielded?</p>
3340	<p>1 methodology?</p> <p>2 A. I don't recall, but there are</p> <p>3 legitimate challenges to any methodology. No</p> <p>4 survey is perfect.</p> <p>5 Q. Okay. And, in fact, you've written</p> <p>6 that, right, that any survey ever done could be</p> <p>7 criticized?</p> <p>8 A. I'm sure that's true. Every survey,</p> <p>9 every scientific process is open to criticism.</p> <p>10 Q. Okay.</p> <p>11 A. Indeed, that's the lifeblood of our</p> <p>12 disciplines.</p> <p>13 Q. Now, page 8 of your direct testimony,</p> <p>14 you say that in your view there were two</p> <p>15 research approaches that would be more useful,</p> <p>16 and one of the ones you listed is a survey of</p> <p>17 cable customers.</p> <p>18 By cable customers, do you mean</p> <p>19 subscribers?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And you told us you have</p> <p>22 designed a lot of surveys over the years,</p> <p>23 right?</p> <p>24 A. Yes.</p> <p>25 Q. Did Program Suppliers ask you to</p>	3342	<p>1 A. Yes, I do.</p> <p>2 Q. And was it before or after?</p> <p>3 A. It was after.</p> <p>4 Q. Okay. Did you have any input</p> <p>5 whatsoever in the design or conduct of the</p> <p>6 Horowitz survey?</p> <p>7 A. No.</p> <p>8 Q. And after you were retained, one of</p> <p>9 the things you did was go back and review</p> <p>10 testimony from prior proceedings about the</p> <p>11 surveys, right?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. Including the testimony of a</p> <p>14 Dr. Rubin?</p> <p>15 A. I believe so.</p> <p>16 Q. Okay. And in this case, the basic</p> <p>17 criticisms you're offering are things that</p> <p>18 Dr. Rubin and others had raised in prior</p> <p>19 proceedings, right?</p> <p>20 A. I don't recall. It's possible. Some</p> <p>21 of them are. I don't know if Dr. Rubin talked</p> <p>22 about a spider web.</p> <p>23 Q. Well, he certainly talked about the</p> <p>24 argument that he felt the question was too</p> <p>25 complex for cable operators to answer, right?</p>

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<p>1 A. Right. And the spider web is part of 2 an illustration. 3 Q. But he said too complex due to the 4 numbers of different programs and signals they 5 might have to think about, right? 6 A. I don't recall what he said. 7 Q. Well, it's in the record and that will 8 reflect it. And Dr. Rubin also raised the same 9 criticism you raised about doing surveys over 10 the telephone, right? 11 A. I don't recall. 12 Q. No reason to doubt it if I represent 13 to you that's in his testimony? 14 A. No reason to doubt it. 15 Q. Okay. Now, all of your sort of 16 general criticisms of the Bortz survey also 17 apply to the Horowitz survey, right? 18 A. That's right. 19 Q. And -- 20 A. Although albeit one or two of them to 21 a lesser degree. 22 Q. Okay. But, I mean, even if we looked 23 through the subject headings in your table of 24 contents, most of them say the Bortz and 25 Horowitz survey did this or that wrong, right?</p>	<p>1 Q. Could distort the respondents' results 2 one way or another? 3 A. That's possible. 4 Q. Okay. And did you review the written 5 rebuttal testimony of Mr. Trautman and 6 Dr. Mathiowetz? 7 A. I did. 8 Q. Okay. And they identified a number of 9 instances of examples used by Mr. Horowitz that 10 were incorrect or misleading, didn't they? 11 A. That they believed were incorrect or 12 misleading. 13 Q. Did you -- and you didn't do any 14 analysis of that yourself, did you? 15 A. I did not do any independent 16 verification as to whether they were indeed 17 incorrect or misleading. 18 Q. Okay. But you would agree, for 19 example, it would be inappropriate to use 20 NASCAR as an example of other sports 21 programming in the survey of a CSO whose 22 distant signals didn't have any NASCAR 23 broadcasts on them, right? 24 A. That's not what I meant. I certainly 25 wouldn't do it that way, but it would certainly</p>
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<p>1 A. I believe my testimony was written -- 2 when I wrote it, I described it as the 3 Bortz/Horowitz survey. 4 Q. Okay. And I noticed when you were 5 talking about improvements to Horowitz this 6 morning, more than once you would either say, 7 you know, with scare quotes, "improvements," or 8 you would call them alleged improvements. 9 So does that mean that you think 10 Horowitz's changes did not really improve his 11 survey? 12 A. No. I -- it means, I think, that the 13 improvements that the -- that the 14 "improvements" improved the survey but not 15 enough to clear a bar where I would consider it 16 to have reliability and validity. 17 Q. Would it improve a survey to include 18 examples in it that are wrong? 19 A. You know, I -- if the examples are, 20 indeed, wrong, then no, that would not -- that 21 would not be an improvement. 22 Q. Okay. And, in fact, that can bias a 23 survey, right? 24 A. Well, what -- bias has a very specific 25 scientific meaning. What do you mean by bias?</p>	<p>1 be misleading to include examples of things 2 that didn't belong in the category. 3 If they had NASCAR, would it be 4 appropriate to include in the category? Maybe. 5 I don't know. So it's a level of degree, not 6 of kind. It's not a light switch. 7 Q. Well, you would agree it wouldn't be 8 appropriate to use as an example programming 9 that's not compensable in this proceeding, 10 right? 11 A. Probably not, yes. 12 Q. Okay. And you'd agree it wouldn't be 13 appropriate to use as an example programming 14 that wasn't carried on a distant signal at all, 15 right? 16 A. As an example for -- I think that's 17 probably right as well. 18 Q. Okay. And you'd agree it wouldn't be 19 appropriate to tell respondents a program was 20 an example of Program Suppliers' programming if 21 it was actually in a different category, right? 22 A. That's -- that's -- yeah, that would 23 be pretty bad. 24 Q. Now, your written direct testimony -- 25 and you might just want to look at it -- at</p>

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3347	<p>1 page 25, you discuss issues that you say may</p> <p>2 arise when a particular individual is the</p> <p>3 respondent for more than one system.</p> <p>4 And you wrote, "Responsibility for</p> <p>5 multiple systems raises two problems. First,</p> <p>6 it is not clear how a respondent responsible</p> <p>7 for multiple systems is supposed to mentally</p> <p>8 process and answer a question framed in the</p> <p>9 singular. Is she/he supposed to pick the</p> <p>10 largest? Pick one at random? Or use the</p> <p>11 average?"</p> <p>12 And then you go on. But that's</p> <p>13 basically your point. If you're responsible</p> <p>14 for more than one system, you're not sure which</p> <p>15 one to focus on, right?</p> <p>16 A. That's what I said here.</p> <p>17 Q. Okay. And you asserted that this was</p> <p>18 a problem for both the Bortz and Horowitz</p> <p>19 surveys, correct?</p> <p>20 A. Well, counsel, I think I can shortcut</p> <p>21 this.</p> <p>22 Q. Okay.</p> <p>23 A. All right?</p> <p>24 Q. You're ready to confess error?</p> <p>25 (Laughter.)</p>	3349	<p>1 A. Oh, that's right.</p> <p>2 Q. -- signals, they were only asked to</p> <p>3 fill out one survey, right?</p> <p>4 A. That's right. That's right.</p> <p>5 Q. So --</p> <p>6 A. And that one survey -- that one survey</p> <p>7 was applied to all the multiple systems.</p> <p>8 Q. Right.</p> <p>9 A. Right.</p> <p>10 Q. So this ambiguity problem --</p> <p>11 A. And I wouldn't have done that either.</p> <p>12 Q. Okay.</p> <p>13 A. Yeah. So it's a different criticism.</p> <p>14 I -- you know, I -- I do have a criticism of</p> <p>15 Horowitz that does not apply to Bortz.</p> <p>16 Q. Okay.</p> <p>17 A. But it's a different criticism than</p> <p>18 the one that's written here.</p> <p>19 Q. Well, if one person is doing one</p> <p>20 survey about multiple systems, doesn't the</p> <p>21 ambiguity issue you've raised at page 25 apply</p> <p>22 to Horowitz in that situation?</p> <p>23 A. Oh, I think it does -- I think -- I'm</p> <p>24 not sure it's an ambiguity issue, but it is an</p> <p>25 issue of not collecting appropriate data.</p>
3348	<p>1 THE WITNESS: No, I'm not. I'm ready</p> <p>2 to point out another one of your errors.</p> <p>3 BY MR. LAANE:</p> <p>4 Q. Okay.</p> <p>5 A. Is that this portion of the direct</p> <p>6 testimony was written based on the original</p> <p>7 Bortz reports. And the Bortz reports were</p> <p>8 silent on the issues that I think you're going</p> <p>9 to start to ask me about --</p> <p>10 Q. Okay.</p> <p>11 A. -- which are clarified in the rebuttal</p> <p>12 reports that I read later.</p> <p>13 So the criticisms that I have levied</p> <p>14 in this section --</p> <p>15 Q. Yes.</p> <p>16 A. -- I no longer levy.</p> <p>17 Q. Against Bortz?</p> <p>18 A. Against Bortz.</p> <p>19 Q. You still levy them against Horowitz?</p> <p>20 A. Oh, I don't know. No, I don't levy</p> <p>21 them against Horowitz.</p> <p>22 Q. Well, isn't it the case that in</p> <p>23 Horowitz where an individual was responsible</p> <p>24 for multiple cable systems, if they had the</p> <p>25 same --</p>	3350	<p>1 Q. Okay. Now, another change -- and you</p> <p>2 addressed a little bit -- in the 2010 through</p> <p>3 '13 Bortz survey versus the prior version was</p> <p>4 the use of a customized survey for systems that</p> <p>5 carried WGN as their only distant signal,</p> <p>6 right?</p> <p>7 A. Right.</p> <p>8 Q. And would you agree for those WGN-only</p> <p>9 systems, you know, what you've been calling the</p> <p>10 spider web becomes much simpler because we have</p> <p>11 just one signal and they're given a written</p> <p>12 description of the programming?</p> <p>13 A. Yes, I would.</p> <p>14 Q. Okay. And you agree that this</p> <p>15 procedure was a positive step, right?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Now, you also said in your</p> <p>18 written direct testimony that the Horowitz</p> <p>19 survey reminds respondents not to assign value</p> <p>20 to programs that are substituted for black-out</p> <p>21 programming. But just to be clear, I mean,</p> <p>22 that general statement is the instruction they</p> <p>23 were given, right?</p> <p>24 And, Geoff, could you bring up slide</p> <p>25 2, please.</p>

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<p>1 A. Yeah.</p> <p>2 Q. Let me just show you. This was the</p> <p>3 instruction given in Horowitz, right? "Please</p> <p>4 do not assign any value to programs that are</p> <p>5 substituted for WGN's blacked-out programming."</p> <p>6 A. Yes.</p> <p>7 Q. Okay. But Horowitz didn't do anything</p> <p>8 to identify for respondents, you know, which</p> <p>9 specific programs were substituted for</p> <p>10 blacked-out programming, right?</p> <p>11 A. I don't recall. I -- I will accept</p> <p>12 your representation that that's correct.</p> <p>13 Q. Okay. You can take that it down,</p> <p>14 Geoff.</p> <p>15 And did you see the testimony from</p> <p>16 Allan Singer and from Mr. Trautman, who</p> <p>17 explained CSOs outside the Chicago area would</p> <p>18 really have no reason to know what programming</p> <p>19 had been blacked out on WGNA?</p> <p>20 A. I don't recall that testimony, but I'm</p> <p>21 sure I read it.</p> <p>22 Q. All right. You don't have any reason</p> <p>23 to doubt that testimony, do you?</p> <p>24 A. No, I don't.</p> <p>25 Q. Okay. Now, you mentioned in your</p>	<p>1 executive for many years?</p> <p>2 A. I did.</p> <p>3 Q. Okay. And did you see Mr. Singer</p> <p>4 disagreed with your assertion that the constant</p> <p>5 sum question was too difficult for cable system</p> <p>6 executives to answer?</p> <p>7 A. I suspect he did, but if we're going</p> <p>8 to talk about it, I'd like to see what he said.</p> <p>9 Q. For these purposes, I'll represent to</p> <p>10 you that that's generally what he said, but</p> <p>11 what I want to ask you is this: Would you</p> <p>12 agree that Mr. Singer, as somebody who was a</p> <p>13 cable system executive for many years, would</p> <p>14 know more than you do about the duties and</p> <p>15 knowledge of a cable system executive?</p> <p>16 A. Well, not necessarily in this type of</p> <p>17 circumstance. And I refer you back to the</p> <p>18 Stanford psychology experiment where the</p> <p>19 psychology Ph.D.'s were all using small sample</p> <p>20 sizes. People are very -- don't necessarily</p> <p>21 have great views of how they make decisions.</p> <p>22 So maybe he does; maybe he doesn't. I</p> <p>23 don't know.</p> <p>24 Q. Okay. Would you agree that the</p> <p>25 constant sum scale is a very popular device in</p>
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<p>1 testimony the Horowitz survey questionnaire</p> <p>2 includes repeated references to distant signals</p> <p>3 and distant broadcast stations.</p> <p>4 But would you agree that in the</p> <p>5 context of a survey administered to CSO</p> <p>6 executives repeatedly referring to distant</p> <p>7 signals and distant stations was likely to tip</p> <p>8 them off the survey related to copyright</p> <p>9 royalties?</p> <p>10 A. Could you repeat the question?</p> <p>11 Q. Sure. You're giving a survey to</p> <p>12 knowledgeable cable system executives. You</p> <p>13 keep referring to distant signals and distant</p> <p>14 stations. Isn't that likely to cause at least</p> <p>15 some of them to infer this is a survey about</p> <p>16 copyright royalties?</p> <p>17 A. I don't know.</p> <p>18 Q. Well, do you agree that potential bias</p> <p>19 in a survey is minimized by having respondents</p> <p>20 blind to the purpose and sponsorship of the</p> <p>21 survey?</p> <p>22 A. I not only agree with it, I have a</p> <p>23 feeling I have written that.</p> <p>24 Q. Okay. Did you look at the rebuttal</p> <p>25 testimony of Mr. Allan Singer, who was a cable</p>	<p>1 marketing research?</p> <p>2 A. Yes, I would. Just my view is that</p> <p>3 it's inappropriate here.</p> <p>4 Q. Because of what you call the spider</p> <p>5 web?</p> <p>6 A. Because of -- of -- well, the whole</p> <p>7 question is inappropriate for reasons beyond</p> <p>8 the spider web, but I think it's inappropriate</p> <p>9 because of the spider web and I think it's</p> <p>10 inappropriate because of the use on the</p> <p>11 telephone.</p> <p>12 Q. Telephone now. And on the telephone,</p> <p>13 you mentioned an article by Axelrod and you're</p> <p>14 referring to Joel Axelrod, correct?</p> <p>15 A. Yes, Journal of Advertising Research</p> <p>16 in 1968.</p> <p>17 Q. And you -- Geoff, could you give me</p> <p>18 the ELMO, please.</p> <p>19 You referred to him a couple times as</p> <p>20 Mr. Axelrod. And he's -- he's actually</p> <p>21 Dr. Axelrod, right?</p> <p>22 A. He is Dr. Axelrod according to this.</p> <p>23 I referred to him as Mr. because he was not an</p> <p>24 academia, and I made an incorrect attribution</p> <p>25 using a flawed heuristic.</p>

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3355	<p>1 (Laughter.)</p> <p>2 BY MR. LAANE:</p> <p>3 Q. Okay. And he was in charge of</p> <p>4 advertising research at some pretty big</p> <p>5 companies, including Lever Brothers and Xerox,</p> <p>6 right?</p> <p>7 A. Lever Brothers, it says here. Does it</p> <p>8 say Xerox here?</p> <p>9 Q. It says Xerox here (indicating).</p> <p>10 A. Um-hum.</p> <p>11 Q. And large corporations invest</p> <p>12 significant amounts of money and expertise in</p> <p>13 their marketing research, right?</p> <p>14 A. Sometimes.</p> <p>15 Q. You expect companies like Lever</p> <p>16 Brothers and Xerox probably would?</p> <p>17 A. Back then, certainly.</p> <p>18 Q. Okay.</p> <p>19 A. Now, less so.</p> <p>20 Q. Did you review Dr. Axelrod's prior</p> <p>21 testimony in these proceedings?</p> <p>22 A. At some point in time, I did.</p> <p>23 Q. So you know he testified in support of</p> <p>24 the Bortz survey, right?</p> <p>25 A. Yes, I do.</p>	3357	<p>1 Dr. Axelrod already admitted as Exhibit 1020.</p> <p>2 JUDGE STRICKLER: And before you get a</p> <p>3 question in on that one, the one we just had</p> <p>4 up, it showed -- I guess it was Dr. Axelrod</p> <p>5 saying "short telephone surveys in business to</p> <p>6 business surveys are appropriate."</p> <p>7 In your understanding, what</p> <p>8 constitutes a short telephone survey?</p> <p>9 THE WITNESS: Well, I guess we're</p> <p>10 getting things -- I'm uncomfortable with that</p> <p>11 question because what constitutes a short</p> <p>12 survey versus a long survey depends on the</p> <p>13 difficulty or the complexity of the task.</p> <p>14 Right?</p> <p>15 JUDGE STRICKLER: Let's bring it home</p> <p>16 to this particular proceeding. In terms of</p> <p>17 duration, did you think that the Horowitz or</p> <p>18 the Bortz survey questions, answer for each one</p> <p>19 of them, if you would -- was a short telephone</p> <p>20 survey or long telephone survey or something</p> <p>21 else?</p> <p>22 THE WITNESS: Well, I think all</p> <p>23 telephone surveys are almost by definition</p> <p>24 short. Right? And they have to be nowadays.</p> <p>25 Otherwise people hang up.</p>
3356	<p>1 Q. And he testified that in the time</p> <p>2 since he wrote his 1968 article, he had gained</p> <p>3 additional expertise using constant sum surveys</p> <p>4 in the business-to-business setting and that he</p> <p>5 did now think it was appropriate to do them</p> <p>6 over the telephone, correct?</p> <p>7 A. Oh, okay. He may have said that. I</p> <p>8 don't agree with him.</p> <p>9 Q. Okay. But he said that?</p> <p>10 A. He said it.</p> <p>11 Q. All right. And, in fact, he</p> <p>12 testified --</p> <p>13 A. I assume he said it. You're</p> <p>14 representing to me he said it. There it is. I</p> <p>15 see he said it.</p> <p>16 Q. And Dr. Axelrod said that he felt, you</p> <p>17 know, a constant sum survey like Bortz was</p> <p>18 ideally suited to the purpose of determining</p> <p>19 the relative value of different types of</p> <p>20 programming, didn't he?</p> <p>21 A. Can we say -- can you point me to that</p> <p>22 passage?</p> <p>23 Q. Geoff, could you bring up Exhibit 1020</p> <p>24 at page 11,231, starting at line 5.</p> <p>25 This is the prior oral testimony of</p>	3358	<p>1 I don't know how to answer that</p> <p>2 question, Your Honor, because this is a very</p> <p>3 complex task that's being asked of the</p> <p>4 respondent.</p> <p>5 JUDGE STRICKLER: Are you aware of how</p> <p>6 much time it took for the -- on average, for</p> <p>7 the median survey respondent to complete it?</p> <p>8 THE WITNESS: And I'm sure counsel</p> <p>9 will advise me if I'm wrong, but I seem to</p> <p>10 recall in one of the Trautman reports it said</p> <p>11 somewhere 15 to 20 minutes.</p> <p>12 JUDGE STRICKLER: Did you think that</p> <p>13 was an adequate amount of time for the task at</p> <p>14 hand for the -- since it was Trautman -- let's</p> <p>15 limit the question to the Bortz survey?</p> <p>16 THE WITNESS: Right. The answer is</p> <p>17 no, because I don't think any amount of time is</p> <p>18 -- is adequate for the task that was put in</p> <p>19 front of them.</p> <p>20 JUDGE STRICKLER: Thank you.</p> <p>21 BY MR. LAANE:</p> <p>22 Q. You would agree a standard goal of</p> <p>23 people designing surveys, including you, is to</p> <p>24 try to keep it down to 20 minutes or less,</p> <p>25 right?</p>

3359

1 A. I think that's right. Okay.
 2 Q. All right. So, Dr. Axelrod's
 3 testimony, you can see he is asked: "In your
 4 judgment is it appropriate to use the constant
 5 sum question to determine the relative values
 6 of different types of programming?" And he
 7 answers: "Yes, I think it's ideally suited for
 8 that purpose, since it forces people to focus
 9 on relationships, rather than to look at each
 10 decision independently."

11 A. Well, I couldn't disagree with him
 12 more because forcing them to focus on
 13 relationships forces them into the spider web.
 14 And this was the distinction I made between the
 15 survey submitted by the Canadian Claimants and
 16 the survey submitted -- the Bortz survey, that
 17 the Canadian Claimants survey eases the spider
 18 web.

19 What Horowitz -- Horowitz --
 20 Dr. Axelrod is saying here I interpret as
 21 saying it's okay to complicate the spider web.

22 Q. In the Canadian survey, if a system
 23 carried more than one Canadian signal, would
 24 they ask them about all the signals or not all
 25 the signals?

3360

1 A. I don't know. I don't recall.

2 Q. Okay. Now, you referred earlier to
 3 the Manual for Complex Litigation. Are you
 4 familiar with Professor Diamond's chapter on
 5 survey research in the Reference Manual For
 6 Scientific Evidence published by the Federal
 7 Judicial Center?

8 A. I am.

9 Q. Okay. And would you agree that sets
 10 forth a good list of criteria to look at in
 11 evaluating a survey?

12 A. She has a -- there are a good set of
 13 criteria, not necessarily a complete set but a
 14 good set of criteria that are implicit in her
 15 treatise that are useful in evaluating surveys.
 16 She doesn't set forth a list like the FJC's
 17 Manual for Complex Litigation, but she has a
 18 very well written chapter describing some
 19 considerations that are useful in designing and
 20 analyzing surveys.

21 Q. Okay. And would you agree that
 22 Dr. Nancy Mathiowetz is a well-qualified survey
 23 methodologist?

24 A. I have no reason to dispute her
 25 qualifications.

3361

1 Q. Okay. Now I want to ask you about the
 2 correlation analysis at pages 18 and 19 of your
 3 rebuttal that you were talking about. A little
 4 earlier today we discussed the correlation
 5 between the responses to Question 3, cost, and
 6 Question 4, the constant sum question on
 7 valuation.

8 And as you told us, your view is those
 9 two questions attempt to elicit the same
 10 information, and so you'd expect a 1.0
 11 correlation, right?

12 A. That's what I said.

13 Q. Okay. But if cost and value are not
 14 the same thing, then you wouldn't expect a 1.0
 15 correlation, right?

16 A. Well, let's be careful, because both
 17 questions -- can we look at both questions?
 18 Because I think the predicate to your question
 19 is flawed.

20 Q. Well, I understand and you've
 21 testified about your interpretation of the two
 22 questions.

23 But if they're different questions,
 24 then you wouldn't necessarily expect a
 25 correlation of 1.0 between the answers, right?

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1 A. You wouldn't necessarily if they are
 2 different questions. But one of the questions
 3 asks about cost and one of the questions asks
 4 how much would you have spent.

5 Q. Well, the question --

6 A. So they're closely related questions,
 7 if they are different. And I'm not sure what
 8 the difference would be and how either one
 9 would relate to marketplace value.

10 Q. Does Mr. Horowitz disagree with you
 11 that the questions are asking the same thing?

12 A. I don't know.

13 Q. Did you look at Mr. Horowitz's
 14 rebuttal testimony?

15 A. No, I did not.

16 Q. If Mr. Horowitz said they're looking
 17 at different things, I take it you would
 18 disagree with him?

19 A. No, I would want to see what he said
 20 and I would want to read it in context to see
 21 why he thinks they're looking at different
 22 things.

23 Q. Now, I want to focus in on how you did
 24 your correlation analysis. And just so we can
 25 see how this works, I just want to look at one

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3363	<p>1 example of how you built the line in your data.</p> <p>2 Can I have a copy of Exhibit 1119.</p> <p>3 You know what, I think I have one. Never mind.</p> <p>4 I think I should have it here. All right.</p> <p>5 MR. LAANE: May I approach, Your</p> <p>6 Honor?</p> <p>7 JUDGE BARNETT: You may.</p> <p>8 BY MR. LAANE:</p> <p>9 Q. And I'm handing you what has been</p> <p>10 marked as Exhibit 1119. This is a Bortz survey</p> <p>11 response. It's a little hard to read, but if</p> <p>12 you see in the upper right-hand corner, it's</p> <p>13 survey number 103. And I just want to use this</p> <p>14 as an example of how you built up the data for</p> <p>15 your correlation analysis.</p> <p>16 So, Geoff, could you put up</p> <p>17 Exhibit 1115, please.</p> <p>18 And, Dr. Steckel, this was produced to</p> <p>19 us as part of the underlying documents for your</p> <p>20 correlation analysis. And you can see at the</p> <p>21 end of that rather long file name it says "CRA</p> <p>22 work product."</p> <p>23 And CRA are the ones who actually</p> <p>24 crunched the numbers for you, right?</p> <p>25 A. Charles River Associates.</p>	3365	<p>1 JUDGE FEDER: And news.</p> <p>2 THE WITNESS: Yes, there were two</p> <p>3 ties.</p> <p>4 BY MR. LAANE:</p> <p>5 Q. And news, right. And then there was</p> <p>6 also a tie between PBS and devotional?</p> <p>7 A. Yes. What row on the spreadsheet are</p> <p>8 we on? Are we on row 106?</p> <p>9 Q. We're on row 106, which, because a few</p> <p>10 rows were taken up for the headings, is survey</p> <p>11 103.</p> <p>12 A. Right.</p> <p>13 Q. And to make it easier to compare all</p> <p>14 these numbers, I just put them on a slide.</p> <p>15 If you could go to slide 5, please,</p> <p>16 Geoff.</p> <p>17 So we can see here that, for example,</p> <p>18 because of the tie, movies, syndicated, and</p> <p>19 news all ended up with a rank of 3, right?</p> <p>20 A. Yes.</p> <p>21 Q. And then because of the tie between</p> <p>22 PBS and devotional, they ended up at tied at</p> <p>23 5.5, right?</p> <p>24 A. Yes.</p> <p>25 Q. But, mathematically, the only way</p>
3364	<p>1 Q. Okay. Known as CRA?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So now, Geoff, if you could go</p> <p>4 down to the row for survey number 103, I think</p> <p>5 it's actually in row 106 of the spreadsheet.</p> <p>6 Okay. So, Dr. Steckel, if you can</p> <p>7 just look across there, and do these numbers</p> <p>8 line up with the ranking for expense and then</p> <p>9 the constant sum figures that we are seeing in</p> <p>10 this survey response form?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And then, Geoff, if you can</p> <p>13 shift the spreadsheet over so we can see the</p> <p>14 columns more to the right.</p> <p>15 What you did here was, since one of</p> <p>16 these was a rank order scale and the other one</p> <p>17 had relative values, is you converted the</p> <p>18 constant sum answers into rankings, right?</p> <p>19 If you could continue going to the</p> <p>20 right there, Geoff.</p> <p>21 So that, for example, where there was</p> <p>22 a tie in relative value, for example,</p> <p>23 syndicated, news and -- let's see. You can</p> <p>24 see, for example, there was a tie between</p> <p>25 syndicated and news here, right?</p>	3366	<p>1 you're going to get a perfect 1.0 correlation</p> <p>2 is if the columns Steckel Q3 rank and Steckel</p> <p>3 Q4 rank have exactly the same numbers, right?</p> <p>4 A. Yes.</p> <p>5 Q. Right. So, I mean, under your</p> <p>6 methodology, it guarantees we're not going to</p> <p>7 have a 1.0 correlation, right?</p> <p>8 A. Well, when there are ties, it</p> <p>9 guarantees. If there are no ties, then you</p> <p>10 still can have the 1.0 correlation.</p> <p>11 However, the impact of ties on rank</p> <p>12 correlations can be very small. For example, I</p> <p>13 did an analysis that showed the impact of a</p> <p>14 single tie -- now this is an extreme example,</p> <p>15 this is admittedly an extreme example -- but</p> <p>16 the impact of a single tie lowers the maximum</p> <p>17 correlation from 1.0 to .9856, which is a small</p> <p>18 -- a small difference.</p> <p>19 And that's why I have the other two</p> <p>20 columns in the table on page 19 to show that</p> <p>21 even if you are going to allow for ties, then</p> <p>22 you still have a lot of data that failed the</p> <p>23 test.</p> <p>24 Q. Well, you say ties are an extreme</p> <p>25 situation. But, actually, ties were extremely</p>

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<p>1 common, weren't they?</p> <p>2 A. No, this is -- this is an extreme</p> <p>3 situation. I did not say ties are an extreme</p> <p>4 situation. I said this particular observation</p> <p>5 was cherry-picked because it is an extreme</p> <p>6 situation, that there are five of the seven</p> <p>7 elements that are tied.</p> <p>8 How many of the respondents of the</p> <p>9 entire 653 plus have five of the seven elements</p> <p>10 tied? I'm sure you could count them on one</p> <p>11 hand and this may be the only one.</p> <p>12 Q. Are you aware that, for example, in</p> <p>13 2010, ties can be found in 106 of 163 of the</p> <p>14 Question 4 response sets?</p> <p>15 A. Well, but then why can't ties be found</p> <p>16 in the rankings too? Can we look at the</p> <p>17 original rankings to see if there are ties</p> <p>18 there?</p> <p>19 Q. The rank order question does not allow</p> <p>20 for ties.</p> <p>21 A. What makes you say that? Unless there</p> <p>22 was somebody in the room or the interviewer was</p> <p>23 telling them don't tie. There's no reason that</p> <p>24 you can't have ties given when somebody is</p> <p>25 asking you to rank order the seven items.</p>	<p>1 correlations of Question 3 versus Question 4,</p> <p>2 right?</p> <p>3 A. Well, I was only concerned with the</p> <p>4 mean. For some reason, the Charles River folks</p> <p>5 did the stack.</p> <p>6 Q. But you didn't report the mean in this</p> <p>7 table either, did you?</p> <p>8 A. That's correct, I did not.</p> <p>9 Q. Okay. And if we look at the mean or</p> <p>10 the stack, it's pretty close to .9 in all four</p> <p>11 years, isn't it?</p> <p>12 A. It was around .9 in all four years.</p> <p>13 But for it to be .9, that means there had to be</p> <p>14 some people who had pretty low correlations.</p> <p>15 And there are here. So what this shows is that</p> <p>16 at least for these four people that are in this</p> <p>17 third column here, that the data have no</p> <p>18 construct validity for those four people.</p> <p>19 And I firmly believe that.</p> <p>20 Q. If cost and value are related but</p> <p>21 different, it wouldn't be surprising to see a</p> <p>22 high but non-1.0 correlation, right?</p> <p>23 A. Well, I mean, if the sun rose in the</p> <p>24 west, it might be possible that I would have a</p> <p>25 sun tan on a different side of my body too.</p>
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<p>1 That's preposterous.</p> <p>2 In fact, if in 653 observations there</p> <p>3 are no ties, I would suspect there were some</p> <p>4 shenanigans going on with what the interviewer</p> <p>5 was doing with respect to those questions. The</p> <p>6 interviewer must have been interfering.</p> <p>7 It's impossible for you not to have</p> <p>8 someone out of 653 respondents offer a tie.</p> <p>9 Q. Are you saying it's not often done in</p> <p>10 survey research that people are given a rank</p> <p>11 order question and not allowed the option for a</p> <p>12 tie?</p> <p>13 A. Well, I didn't see anything in the</p> <p>14 question that said don't tie. So if there are</p> <p>15 no ties, if you're representing to me that</p> <p>16 there are no ties in the 653 respondents, then</p> <p>17 my experience tells me that the interviewer was</p> <p>18 forbidding ties.</p> <p>19 Q. Geoff, could you give me the ELMO</p> <p>20 again, please.</p> <p>21 The chart on your correlation analysis</p> <p>22 at page 19, you put in the minimum correlation.</p> <p>23 Although you didn't show it in your charts, in</p> <p>24 your underlying documents, you also computed</p> <p>25 the mean correlation and the stacked</p>	<p>1 But, you know, if cost and value are different</p> <p>2 things, then that only highlights, as Your</p> <p>3 Honor claimed before -- explained before -- not</p> <p>4 that -- asked before, the ambiguity in the</p> <p>5 language used in the questions.</p> <p>6 And that -- also that removes</p> <p>7 construct validity immediately.</p> <p>8 Q. If they're related but different, you</p> <p>9 wouldn't be surprised to see a high but not</p> <p>10 perfect correlation, right?</p> <p>11 A. Well, I would like to know what they</p> <p>12 are, but, you know, we could also do -- the</p> <p>13 mean is not what's relevant. What's relevant</p> <p>14 is the proportion of the sample that gives you</p> <p>15 bad data.</p> <p>16 And so I would take a look at -- let's</p> <p>17 say, I would argue that the fraction that's</p> <p>18 below .9 is a more -- is more indicative of the</p> <p>19 metric that we want to look at in evaluating</p> <p>20 these data than the mean.</p> <p>21 Q. You talked a little bit about the</p> <p>22 Canadian survey. And the Canadian survey was</p> <p>23 only designed to look at the value of</p> <p>24 programming on Canadian distant signals, right?</p> <p>25 A. That's my recollection, yes.</p>

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3371	<p>1 Q. It wasn't designed to look at the</p> <p>2 entire universe of Form 3 systems, right?</p> <p>3 A. I don't recall, but I'll accept that.</p> <p>4 Q. Okay. Thank you. I have no further</p> <p>5 questions.</p> <p>6 JUDGE BARNETT: Any other</p> <p>7 cross-examination? Hearing none, redirect?</p> <p>8 MR. OLANIRAN: No redirect, Your</p> <p>9 Honor.</p> <p>10 JUDGE BARNETT: Thank you,</p> <p>11 Mr. Olaniran.</p> <p>12 Professor Steckel, thank you. You may</p> <p>13 be excused.</p> <p>14 THE WITNESS: Thank you.</p> <p>15 (The witness stood down.)</p> <p>16 MR. OLANIRAN: Your Honor, Dr. Stec is</p> <p>17 our next witness and is kind of MIA at this</p> <p>18 minute. So we're in search -- sorry.</p> <p>19 JUDGE BARNETT: Well, then let's take</p> <p>20 our afternoon recess while the search party</p> <p>21 goes out.</p> <p>22 MR. OLANIRAN: I appreciate that.</p> <p>23 Thank you.</p> <p>24 JUDGE BARNETT: 15 minutes.</p> <p>25 (A recess was taken at 2:21 p.m.,</p>	3373	<p>1 we might be done before 4:30? Is that your</p> <p>2 point?</p> <p>3 MR. OLANIRAN: Yes.</p> <p>4 JUDGE BARNETT: Oh, Dr. Gray, Mr.</p> <p>5 Horowitz, and Ms. Hamilton are not on deck, is</p> <p>6 what you are saying?</p> <p>7 MR. OLANIRAN: Well, Mr. Lindstrom is</p> <p>8 actually next, but we weren't certain where we</p> <p>9 were going to -- when we were going to finish</p> <p>10 today. So rather than have him come and hang</p> <p>11 out until 4:15, we thought --</p> <p>12 JUDGE BARNETT: Understood.</p> <p>13 JUDGE STRICKLER: And if you just keep</p> <p>14 clarifying this point, it will all be moot</p> <p>15 anyway.</p> <p>16 (Laughter.)</p> <p>17 JUDGE BARNETT: But Dr. Gray is on</p> <p>18 deck after Mr. Lindstrom?</p> <p>19 MR. OLANIRAN: That's correct.</p> <p>20 JUDGE BARNETT: All right. Thank you.</p> <p>21 Proceed.</p> <p>22 DIRECT EXAMINATION</p> <p>23 BY MR. OLANIRAN:</p> <p>24 Q. Good afternoon, Dr. Stec. Would you</p> <p>25 please state your full name for the record?</p>
3372	<p>1 after which the trial resumed at 2:44 p.m.)</p> <p>2 JUDGE BARNETT: Good afternoon. All</p> <p>3 but the witness please be seated. Please raise</p> <p>4 your right hand.</p> <p>5 Whereupon--</p> <p>6 JEFFREY A. STEC,</p> <p>7 having been first duly sworn, was examined and</p> <p>8 testified as follows:</p> <p>9 JUDGE BARNETT: Please be seated.</p> <p>10 THE WITNESS: Thank you.</p> <p>11 MR. OLANIRAN: Your Honor, just</p> <p>12 quickly, a housekeeping matter.</p> <p>13 JUDGE BARNETT: Yes.</p> <p>14 MR. OLANIRAN: The order of the</p> <p>15 witnesses. The next witness would be Mr. Paul</p> <p>16 Lindstrom. And by consent of the parties, I</p> <p>17 think we're going to start Mr. Lindstrom in the</p> <p>18 morning, assuming that we finish with Mr. Stec</p> <p>19 today.</p> <p>20 JUDGE BARNETT: All right.</p> <p>21 MR. OLANIRAN: If that's okay with</p> <p>22 Your Honors.</p> <p>23 JUDGE BARNETT: Yes. That's when we</p> <p>24 normally start is in the morning.</p> <p>25 JUDGE STRICKLER: Are you saying that</p>	3374	<p>1 A. My name is Jeffrey Alan Stec.</p> <p>2 Q. And would you please describe your</p> <p>3 educational background?</p> <p>4 A. Sure. I have a Bachelor's degree in</p> <p>5 psychology and philosophy from Cornell</p> <p>6 University.</p> <p>7 I also have a Bachelor's degree with a</p> <p>8 minor in math. The Bachelor's degree is in</p> <p>9 economics with a minor in math from the</p> <p>10 University of Illinois at Chicago.</p> <p>11 And then I have a Master's degree and</p> <p>12 a Ph.D. in economics from the Ohio State</p> <p>13 University.</p> <p>14 Q. Dr. Stec, would you mind speaking into</p> <p>15 the microphone a little bit more?</p> <p>16 A. Sure.</p> <p>17 Q. Thank you. And who is your employer?</p> <p>18 A. I am employed by Berkeley Research</p> <p>19 Group.</p> <p>20 Q. And what's your position at Berkeley</p> <p>21 Research Group?</p> <p>22 A. I'm a managing director there. I'm</p> <p>23 also a leader of their intellectual property</p> <p>24 practice and a co-leader in their economic and</p> <p>25 damages community.</p>

<p style="text-align: right;">3375</p> <p>1 Q. And what type of organization is 2 Berkeley Research Group? 3 A. Well, Berkeley Research Group is a 4 large economic consulting firm. We do a lot of 5 different things. 6 For example, we provide expert 7 testimony in litigation proceedings. We also 8 do different types of investigation work like 9 forensic accounting investigations. 10 We do a lot of regulatory work, a lot 11 of healthcare work. Basically a lot of 12 economic and management consulting type work. 13 So, for example, Forbes named Berkeley 14 Research Group one of the best management 15 consulting firms for 2017. Berkeley Research 16 Group has its primary office, its corporate 17 office in Emeryville, California, and then has 18 offices around the United States as well as 19 overseas. 20 Q. And what type of consulting expertise 21 do you provide to your clients in the context 22 of litigation? 23 A. I have been practicing economic 24 consulting professionally for approximately 18 25 years. In that context I have specialized in</p>	<p style="text-align: right;">3377</p> <p>1 in that same regard. 2 Q. Okay. And in what types of cases have 3 you used this type of apportionment 4 methodology? 5 A. Well, I can use a couple examples. So 6 in the patent world, for example, there are 7 products like Smartphones that have many 8 different components, each of which have 9 different patents that are associated with it. 10 And you are trying in some of those 11 instances to value a portion of that Smartphone 12 related to a feature, per se, and ultimately 13 figure out what the value is of that component 14 in a multi-component product. So that's in the 15 patent space. 16 In the trademark space, I have done 17 similar work, trying to get at the value of a 18 trademark or a piece of trade dress, and the 19 value you would associate with that independent 20 of the other features or benefits of a 21 particular product. 22 And then in the copyright world, I 23 have done quite a bit of work looking at 24 licenses for copyrighted materials and trying 25 to figure out the value of the copyright in the</p>
<p style="text-align: right;">3376</p> <p>1 intellectual property consulting. 2 What that means, essentially, is I 3 provide testimony in proceedings dealing with 4 IP, but I also provide consulting services for 5 the purposes of looking at the value of IP, 6 strategically how you might want to employ IP, 7 the various things that you might want to do 8 with IP in a non-litigation sense as well. 9 Q. And you conducted some analysis on 10 behalf of Program Suppliers for this 11 proceeding; is that correct? 12 A. Yes, I did. 13 Q. And what specific expertise did you 14 use in the analysis that you are providing in 15 this proceeding? 16 A. Well, a lot of the work that I have 17 done over the years in intellectual property 18 has to do with apportionment and the 19 application of apportionment methodologies in 20 the context of IP. 21 So what that means essentially is from 22 an economic perspective how you might look at a 23 component of a piece of intellectual property 24 and try to value that. From a survey research 25 perspective, it is also using survey research</p>	<p style="text-align: right;">3378</p> <p>1 context of a larger product. 2 Q. Okay. And was there any part of your 3 academic studies that provided a useful 4 background for the analysis that you conducted 5 in this proceeding? 6 A. Yes. Through the course of my 7 educational background, I spent a lot of time 8 with economics, econometrics, and survey 9 research learning the various information 10 theories, what have you, practices, for the 11 purposes of applying those different 12 disciplines in the context of the valuation of 13 intellectual property. 14 Q. And have you conducted -- have you 15 been involved in survey research studies? 16 A. In the context of my graduate work, I 17 not only earned my Ph.D. in economics, but I 18 was working at the Center for Survey Research 19 at the university from which I earned that 20 Ph.D. 21 And in that context I did multiple 22 surveys looking at consumers' perceptions, 23 consumers' actions, how they interact in the 24 marketplace from a survey research perspective. 25 Q. And beyond graduate schools, have you</p>

<p style="text-align: right;">3379</p> <p>1 been involved with any surveys?</p> <p>2 A. Yes, I have. So in graduate school I</p> <p>3 did quite a few surveys in those particular</p> <p>4 areas. Since that time I have been involved in</p> <p>5 many more surveys, both as a consulting expert,</p> <p>6 as well as a testifying expert.</p> <p>7 Q. And about how many surveys would you</p> <p>8 say in total that you have been involved in one</p> <p>9 way or another?</p> <p>10 A. I would estimate in graduate school I</p> <p>11 probably was involved with 70 to 80 different</p> <p>12 surveys over the course of my graduate school</p> <p>13 career. And then since that time, probably at</p> <p>14 least 100 more in my professional career.</p> <p>15 Q. And what have you done career-wise</p> <p>16 since the time you earned your Ph.D. in</p> <p>17 economics?</p> <p>18 A. Well, coming out of graduate school, I</p> <p>19 was very interested in economic consulting.</p> <p>20 And I started with a firm called InteCap. That</p> <p>21 was short for Intellectual Capital.</p> <p>22 And what they specialized in, they</p> <p>23 were a boutique firm that specialized in IP</p> <p>24 services. So basically litigation, valuation,</p> <p>25 strategy, the various things that I have</p>	<p style="text-align: right;">3381</p> <p>1 transactions that they have consummated.</p> <p>2 The other type of data that I have</p> <p>3 relied upon for the purposes of various</p> <p>4 analyses I have done is what is called stated</p> <p>5 preference data. This is the type of data that</p> <p>6 you traditionally collect when you do a survey.</p> <p>7 It is asking consumers or whomever the</p> <p>8 survey respondents may be about their</p> <p>9 preferences or their actions or whatever you</p> <p>10 are interested in, and then having them state</p> <p>11 their preferences that way.</p> <p>12 Q. Okay. And in what context has your</p> <p>13 economic and survey research consulting</p> <p>14 experience been used?</p> <p>15 A. It has been used in a number of</p> <p>16 different contexts. Basically as an expert, a</p> <p>17 testifying expert in the litigation space, but</p> <p>18 also, as I have mentioned, I have done quite a</p> <p>19 bit of strategy and valuation work outside of</p> <p>20 litigation to try and get an understanding of</p> <p>21 intellectual property.</p> <p>22 Q. And have you been qualified as an</p> <p>23 expert in economic and survey research in the</p> <p>24 area of intellectual property in other</p> <p>25 proceedings?</p>
<p style="text-align: right;">3380</p> <p>1 already described.</p> <p>2 In about four years of my tenure</p> <p>3 there, after about four years, they were</p> <p>4 purchased by a company called Charles River</p> <p>5 Associates. I was with Charles River</p> <p>6 Associates until very recently, so for</p> <p>7 approximately another 13 years after that.</p> <p>8 And I recently moved, like I said, to</p> <p>9 Berkeley Research Group.</p> <p>10 Q. And what type of information have you</p> <p>11 relied upon for your -- for these IP</p> <p>12 engagements that you have talked about?</p> <p>13 A. Well, basically the way I look at the</p> <p>14 different analyses that you can do in the</p> <p>15 context of intellectual property, there are two</p> <p>16 types of data that I have relied upon.</p> <p>17 There is what is called revealed</p> <p>18 preference data. This is data you typically</p> <p>19 think of when you are thinking about</p> <p>20 transactions, financial transactions,</p> <p>21 transactions between, you know, willing buyers</p> <p>22 and willing sellers, typically is what is</p> <p>23 called revealed preference data.</p> <p>24 And that data allows you to sort of</p> <p>25 see what consumers' preference is, based on the</p>	<p style="text-align: right;">3382</p> <p>1 A. Yes, I have.</p> <p>2 Q. And in what specific proceedings have</p> <p>3 you been qualified as an expert?</p> <p>4 A. I've been qualified as a testifying</p> <p>5 expert in District Courts, in State Courts, in</p> <p>6 front of the International Trade Commission</p> <p>7 here in D.C., as well as in various</p> <p>8 arbitrations, both from the American</p> <p>9 Arbitration Association, as well as the</p> <p>10 International Arbitration Association.</p> <p>11 Q. And have you given any presentations</p> <p>12 or written articles on economic issues that</p> <p>13 relate to intellectual property?</p> <p>14 A. I have. I have done about 10 to 15</p> <p>15 articles and presentations looking at various</p> <p>16 types of intellectual property from an economic</p> <p>17 standpoint.</p> <p>18 Q. And how many presentations or articles</p> <p>19 on that, on economic issues?</p> <p>20 A. About 10 to 15.</p> <p>21 Q. Okay. And have you done similarly</p> <p>22 with respect to survey issues as they relate to</p> <p>23 IP?</p> <p>24 A. Yes. I think I have done about 15 to</p> <p>25 20, as best I can recall, presentations and/or</p>

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<p>1 articles looking at survey research as it 2 relates to IP. And that includes publication 3 of a chapter in the Litigation Services 4 Handbook on the use of surveys in litigation. 5 Q. All right. Are you a member of any 6 professional organizations? 7 A. I am. I'm a member of the American 8 Economic Association, obviously, due to my 9 economic background. 10 I'm also a member of the Intellectual 11 Property Owners Association and the Licensing 12 Executive Society, which are two IP-based trade 13 organizations. 14 And then I am also a member of the 15 American Association for Public Opinion 16 Research, which is a survey research-based 17 organization. And not only am I a member of 18 some of these organizations, but I have also 19 served on various committees. 20 So, for example, in the Intellectual 21 Property Owners Association, I have been a 22 member of the Damages and Injunctions 23 Committee. And for AAPOR, the American 24 Association for Public Opinion Research, I have 25 been part of their Litigation Surveys</p>	<p>1 information? 2 A. I was. After I had filed my initial 3 or my -- my original expert report, some 4 additional information had been produced, 5 unredacted survey information from Mr. 6 Trautman, related to the Bortz survey that he 7 conducted. 8 So I was also asked to review that 9 survey data and address some of the issues 10 related to it. 11 Q. Okay. And did you prepare a written 12 report as to your findings? 13 A. Yes, I did. 14 Q. And would you please turn -- you 15 should have in front of you a black binder with 16 a green cover. 17 A. Yes, I do. 18 Q. Do you see an exhibit numbered 6016? 19 A. Yes, I have that in front of me. 20 Q. And would you please identify that 21 document? 22 A. This is my amended rebuttal testimony. 23 It was originally introduced September 15th of 24 2017 and then amended February 12th of 2018. 25 Q. And is this the report you provided as</p>
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<p>1 Committee. 2 Q. And have you provided a more detailed 3 background of your -- a more detailed 4 information about your background in your 5 submission in this case? 6 A. Yes, I have, including my full CV. 7 MR. OLANIRAN: Your Honors, we offer 8 Dr. Stec as an expert witness in economics, 9 econometrics and survey research. 10 JUDGE BARNETT: Hearing no objection, 11 Dr. Stec is so qualified. 12 BY MR. OLANIRAN: 13 Q. Dr. Stec, what -- what were you asked 14 to do in this proceeding? 15 A. I was asked to review some of the 16 expert opinions put forth by the Joint Sports 17 Claimants regarding various topics related to 18 the Bortz survey and some regression analysis 19 as well. 20 Q. And specifically which JSC expert 21 reports were you asked to address? 22 A. I was asked to address Dr. Connolly's 23 endorsement, basically, of the Bortz survey, as 24 well as Dr. Israel's regression analysis. 25 Q. Were you asked to review any other</p>	<p>1 to your findings in this proceeding? 2 A. Yes, it is. 3 Q. Were you responsible for the 4 preparation of this report? 5 A. Yes, I was. 6 Q. And does this report contain more 7 detailed information about your education and 8 experience? 9 A. Yes, it does. 10 Q. And do you have any corrections to 11 this report? 12 A. No, not as I sit here. 13 Q. And do you believe this report should 14 be true and correct and of your personal 15 knowledge? 16 A. Yes, I do. 17 Q. Now, in order to complete the task you 18 were asked to do in this proceeding, what type 19 of information did you consider? 20 A. Well, as I mentioned, I was asked to 21 review the opinions of Dr. Connolly and Dr. 22 Israel. So I reviewed their expert reports as 23 part of what I reviewed. 24 There were also other experts as part 25 of this proceeding that touched on some of the</p>

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3387	<p>1 issues I was asked to address related to the</p> <p>2 Bortz survey in particular, so I reviewed those</p> <p>3 expert reports.</p> <p>4 There was also expert reports from</p> <p>5 previous proceedings that touched on some of</p> <p>6 the subject matter that I was asked to review,</p> <p>7 so I reviewed those.</p> <p>8 And then there was third-party</p> <p>9 information, articles, book chapters, various</p> <p>10 other things that were not part of the</p> <p>11 proceeding, per se, but that were useful</p> <p>12 publications or articles that ultimately I</p> <p>13 reviewed as part of this as well.</p> <p>14 For the purposes of disclosing all of</p> <p>15 this information, it's contained in the</p> <p>16 footnotes of my report, all of the information</p> <p>17 that I reviewed.</p> <p>18 Q. And did you reach an opinion or</p> <p>19 opinions as to the appropriateness of certain</p> <p>20 methodologies that are advocated by Joint</p> <p>21 Sports Claimant experts?</p> <p>22 A. Yes, I did.</p> <p>23 Q. And what are those opinions?</p> <p>24 A. Well, the first opinion that I came to</p> <p>25 was that Dr. Connolly's endorsement of the</p>	3389	<p>1 constant sum question that was asked of them in</p> <p>2 the Bortz survey.</p> <p>3 And even if they understood it, there</p> <p>4 was some question in my mind whether they had</p> <p>5 the proper qualifications, whether they were</p> <p>6 qualified to actually give reliable answers to</p> <p>7 it. That was the first reason that I had a</p> <p>8 problem with the Bortz survey and</p> <p>9 Dr. Connolly's endorsement of it.</p> <p>10 The second reason was related to what</p> <p>11 actually I believe the Bortz survey can be said</p> <p>12 to represent or what it is trying to estimate</p> <p>13 versus what it -- what everybody, I think, is</p> <p>14 -- at least under my understanding -- is</p> <p>15 interested in with respect to this proceeding.</p> <p>16 And, that is, the Bortz survey is not</p> <p>17 estimating relative market value because it is</p> <p>18 not taking into account properly the</p> <p>19 marketplace.</p> <p>20 Q. And with regard to the regression</p> <p>21 analysis done by Dr. Israel, can you tell me,</p> <p>22 in general, what led you to -- what led to your</p> <p>23 opinion that that analysis is flawed?</p> <p>24 A. Sure. There were two basic reasons</p> <p>25 why, I believe, that Dr. Israel's regression</p>
3388	<p>1 Bortz survey is flawed for the reason that,</p> <p>2 based on my review of the Bortz survey, it is</p> <p>3 flawed.</p> <p>4 The second opinion that I came to was</p> <p>5 the -- is the regressions that Dr. Israel</p> <p>6 conducted were also flawed.</p> <p>7 Q. And we will get to the basis for those</p> <p>8 opinions, but before we get there, can you give</p> <p>9 us a high-level view of the basis for your</p> <p>10 opinion that the Bortz survey and Dr. Connolly</p> <p>11 relying on it is flawed from an economic</p> <p>12 standpoint?</p> <p>13 A. Sure. There were a couple reasons</p> <p>14 that I came to the conclusion that the Bortz</p> <p>15 survey was flawed, and then as it follows</p> <p>16 Dr. Connolly's endorsement of it was flawed. I</p> <p>17 provided a slide to sort of illustrate this.</p> <p>18 One, the first reason that I believe</p> <p>19 the Bortz survey was flawed and, therefore,</p> <p>20 Dr. Connolly's opinion of it was flawed, was</p> <p>21 due to the fact that survey respondents in that</p> <p>22 survey said, these are the sampled CSOs, it was</p> <p>23 difficult for me -- in fact, I find it would be</p> <p>24 hard to believe that the respondents in those</p> <p>25 surveys were understanding the question, the</p>	3390	<p>1 analysis is flawed. The first is that he is</p> <p>2 using data from a regulated market to infer</p> <p>3 relationships from or about an unregulated</p> <p>4 market.</p> <p>5 I don't believe that's appropriate.</p> <p>6 And you can't infer what he may be measuring or</p> <p>7 trying to measure in a regulated market using</p> <p>8 regulated market data to try and say something</p> <p>9 about an unregulated market.</p> <p>10 The second reason that I believe Dr.</p> <p>11 Israel's regressions are flawed is because he</p> <p>12 is actually specifying a regression, the</p> <p>13 royalty payments as a function of the</p> <p>14 programming minutes or the programming that's</p> <p>15 being aired on a given signal.</p> <p>16 But in terms of how those royalty</p> <p>17 payments are actually determined, that's not</p> <p>18 how I understand them to be determined</p> <p>19 according to the statute.</p> <p>20 Therefore, there is a spurious</p> <p>21 relationship there that is -- makes the</p> <p>22 regression inappropriate.</p> <p>23 Q. And, Dr. Stec, you stated that the</p> <p>24 Bortz survey respondents could not have</p> <p>25 understood the question and could not have been</p>

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<p>1 qualified to answer the questions with regard 2 to the relative market value question. 3 And why do you say that? 4 A. Well, based on my review of some of 5 the materials that I reviewed as part of my 6 assignment, Ms. Hamilton, Sue Ann Hamilton, who 7 from what I understand was a programming 8 director at one time for a CSO, basically 9 testified that program directors, respondents 10 at these CSOs who completed the survey, don't 11 think about the programming categories the way 12 they have been defined as part of this 13 proceeding in their ordinary course of 14 business. 15 So, in other words, they think about 16 the programming differently than how it has 17 been defined here. 18 So when you give them a certain 19 category, for example, and ask them about it, 20 they may not have, according to Ms. Hamilton, 21 the same understanding of what's in that 22 programming category with regards to 23 programming content as the definition has been 24 given in these proceedings. 25 Q. Okay. And let's -- why -- could you</p>	<p>1 they do in the marketplace is they buy distant 2 retransmitted signals. They don't buy 3 programming content per se. 4 Since they don't have that experience 5 in the marketplace of actually buying the 6 programming content, that we're trying to value 7 as part of this proceeding, they don't have the 8 requisite experience then to answer these 9 particular questions. 10 Ultimately the implication of these 11 two pieces of information, one, they don't have 12 an understanding of the programming categories 13 and, two, they don't have experience with, you 14 know, market transactions for these programming 15 categories, is that when you give them the 16 survey questions, you're likely to get 17 unreliable data because they don't bring the 18 proper knowledge and experience to bear to 19 answer the questions. 20 Q. Do you have an example of the 21 difference in how program categories are 22 thought of in this proceeding versus how they 23 are thought of in the market? 24 A. Sure. And this is based, again, on 25 some information that I read from Ms. Hamilton,</p>
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<p>1 elaborate on the basis for your opinion that 2 the respondents -- the respondents could not 3 have understood or been qualified to answer the 4 relative market value question? 5 A. Sure. With -- 6 MR. MacLEAN: Objection, leading, Your 7 Honor. The answer is on the slide. 8 JUDGE BARNETT: Sustained. 9 MR. OLANIRAN: Can you take the slide 10 off, please. 11 BY MR. OLANIRAN: 12 Q. Now would you please answer the 13 question? 14 A. Sure. So I just mentioned a moment 15 ago about why I believe that survey respondents 16 in the Bortz survey may not have an adequate 17 understanding of what they are being asked. 18 The other point that I was making was 19 that they may not be qualified to actually 20 answer the question. And the basis for that 21 opinion was my understanding that they don't 22 actually conduct market transactions for the 23 programming types that are at issue in this 24 particular case. 25 Basically my understanding is, is what</p>	<p>1 where in the marketplace, typical program 2 managers from a CSO may think about sports more 3 broadly than what it has been defined here. 4 So it is my understanding that for 5 this proceeding, there is a live team sports, 6 professional and college team sports category. 7 But there is other sports that don't fall into 8 that category that have to do with like NASCAR 9 racing or swimming or tennis or various things 10 like that that don't fall into what's been 11 called the Joint Sports Claimant category. 12 And in that context, then, the 13 question becomes do these survey respondents 14 think of sports more broadly, that would 15 include these other sports as part of this 16 other category, or don't they? 17 And the -- at least from what I've 18 seen, it suggests that they may think about it 19 more broadly than has been defined as part of 20 this proceeding. 21 JUDGE FEDER: Excuse me, Doctor. 22 Was -- were the survey respondents 23 asked to value sports or were they asked a more 24 specific question? 25 THE WITNESS: Well, in the context --</p>

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3395	<p>1 it depends what survey you're looking at. So</p> <p>2 there is the Bortz survey and there is the</p> <p>3 Horowitz survey.</p> <p>4 JUDGE FEDER: Let's start with the</p> <p>5 Bortz survey.</p> <p>6 THE WITNESS: In the context of the</p> <p>7 Bortz survey, they were asked about sports in</p> <p>8 general, live college and professional team</p> <p>9 sports. I don't have the survey question</p> <p>10 memorized.</p> <p>11 JUDGE FEDER: You say live college and</p> <p>12 professional team sports. And it is your</p> <p>13 testimony that a professional in the cable</p> <p>14 industry doesn't know what that means?</p> <p>15 THE WITNESS: No, it is my testimony</p> <p>16 that they may think of it more broadly than</p> <p>17 what it has been defined as as part of these</p> <p>18 proceedings.</p> <p>19 JUDGE FEDER: Would you think that a</p> <p>20 professional in the cable industry would</p> <p>21 consider NASCAR to be a live professional or</p> <p>22 college team sport?</p> <p>23 THE WITNESS: That's certainly a</p> <p>24 possibility. Ms. Hamilton has given testimony</p> <p>25 to that. And I do have some analyses that I</p>	3397	<p>1 Q. And do you have the -- do you have --</p> <p>2 have you observed any evidence that</p> <p>3 demonstrates the disconnect between what survey</p> <p>4 respondents -- how survey respondents</p> <p>5 understand the questions and how the Bortz</p> <p>6 questions are posed?</p> <p>7 A. Yes, this is the analysis I was just</p> <p>8 alluding to a moment ago. I prepared a slide</p> <p>9 that basically compares the Horowitz survey</p> <p>10 results to the Bortz survey results, breaking</p> <p>11 it out by the various categories that they had</p> <p>12 in each of the surveys, as well as over the</p> <p>13 years the survey was conducted, so from 2010 to</p> <p>14 2013.</p> <p>15 So if I can draw your attention to the</p> <p>16 slide that's up now, you will see for each of</p> <p>17 the columns that are there, so for 2010, for</p> <p>18 example, I have put the various allocation</p> <p>19 percentages from the Horowitz survey and</p> <p>20 juxtaposed them to the various percentages that</p> <p>21 you see there for that same year for the Bortz</p> <p>22 survey.</p> <p>23 And so you can compare those</p> <p>24 percentages side-by-side for each of the</p> <p>25 categories that you see.</p>
3396	<p>1 have done myself that has suggested that they</p> <p>2 may think about it more broadly like that as</p> <p>3 well.</p> <p>4 JUDGE FEDER: Okay. And in the</p> <p>5 Horowitz survey?</p> <p>6 THE WITNESS: The Horowitz survey</p> <p>7 actually breaks out the sports category into</p> <p>8 two what I will call sub-categories. There is</p> <p>9 the live professional and college team sports</p> <p>10 category, as we have just defined it, and then</p> <p>11 ultimately this other sports category that's</p> <p>12 meant to capture the NASCAR and the tennis and</p> <p>13 the swimming and the various other sports that</p> <p>14 aren't part of that live professional and</p> <p>15 college team sports category.</p> <p>16 JUDGE FEDER: And does that help or</p> <p>17 hurt in your estimation?</p> <p>18 THE WITNESS: In my opinion, I think</p> <p>19 that helps. I -- I will be presenting some</p> <p>20 analyses, I believe, that can show how that</p> <p>21 does help, how the breakout leads to different</p> <p>22 percentages in terms of these allocations to</p> <p>23 the constant sum question.</p> <p>24 JUDGE FEDER: Okay. Thank you.</p> <p>25 BY MR. OLANIRAN:</p>	3398	<p>1 Now, one of the takeaways that I have</p> <p>2 from this particular analysis is if you focus</p> <p>3 on the live coverage of professional and</p> <p>4 college team sport category, and the other</p> <p>5 sport programming category, you can see that</p> <p>6 when you compare Horowitz to Bortz, Bortz is</p> <p>7 always -- has a higher percentage there than</p> <p>8 Horowitz for that live coverage of professional</p> <p>9 and college team sports.</p> <p>10 How can we understand why, if the</p> <p>11 Horowitz survey is trying to emulate or mimic</p> <p>12 the Bortz survey, would they have these</p> <p>13 different percentages?</p> <p>14 Well, if you look at the other sports</p> <p>15 programming category, the category that was</p> <p>16 implemented by Horowitz but not by Bortz, you</p> <p>17 can see at least some of that percentage</p> <p>18 difference that you observed from the live</p> <p>19 coverage being attributed to the other sports</p> <p>20 category.</p> <p>21 This to me reflects that at least some</p> <p>22 of the respondents in the Bortz survey were</p> <p>23 likely allocating these percentages across all</p> <p>24 sports as opposed to just the live coverage of</p> <p>25 professional and college teams.</p>

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1 Q. And you give another reason as to why
2 you didn't think the Bortz survey respondents
3 understood the questions that have been asked
4 and why they were not qualified. Could you --
5 to respond to the questions. Could you
6 elaborate on that?

7 A. Sure. This was in the context of
8 understanding. Do the respondents understand
9 the different categories that are given to them
10 as part of the survey.

11 Now the question becomes: Well, even
12 assuming they understand these particular
13 categories and how they are defined for the
14 purposes of this proceeding, do they actually
15 have the requisite information? In other
16 words, are they qualified to be able to answer
17 these particular questions that are given to
18 them?

19 And in the context of some of the
20 analyses I have done, there is certainly
21 evidence to suggest they are not qualified
22 because they don't give consistent answers to
23 these allocation questions or to the constant
24 sum question in terms of these allocation
25 percentages across the different surveys, the

1 surveys, these Bortz survey responses were
2 inconsistent?

3 A. Well, if you recall, one of the things
4 that I reviewed as part of my work here was the
5 unredacted information that was produced by Mr.
6 Trautman, the Bortz survey itself, for the
7 years 2010 to 2013.

8 What that information allowed me to do
9 is look at what CSOs, respondents from CSOs,
10 said to this constant sum question and how they
11 did the allocation across these different
12 categories over the years to determine whether
13 or not the answers were substantively similar
14 or not.

15 Q. And do you have a demonstrative
16 exhibit which demonstrates your analysis -- the
17 analysis you just discussed?

18 A. Sure, I do. The first thing I would
19 like to show is basically what is called the
20 scatter plot. When I think about analyzing
21 data, the first thing I think about doing is
22 can we represent things pictorially, because
23 that's always a good way, at least as a first
24 step, to think about what might be happening.
25 And so that's what I have done here.

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1 Bortz surveys or comparing the Bortz survey to
2 the Horowitz survey.

3 Q. And you said you did some analysis
4 that said the responses were inconsistent with
5 respect to the Bortz survey?

6 A. That's -- yes, that's exactly what I
7 said.

8 Q. Okay. And are you using consistent as
9 a term of art or just in the -- as a
10 layperson's term?

11 A. Well, for a survey researcher, frankly
12 for a scientist in general, the term
13 "consistent" has a special connotation or a
14 special meaning.

15 When you think about doing survey
16 research, for example, and you think about
17 doing surveys, if you ask the same or similar
18 question in repeated surveys to the same
19 respondents, you would expect or at least hope
20 that you get the same results time after time.

21 If you do, that's what consistent
22 means, at least in a survey research sense.
23 And if you don't, that suggests the answers
24 that you are seeing are inconsistent.

25 Q. And how did you determine that these

1 So let me explain what you are looking
2 at. This is a comparison for CSOs that took
3 both the 2010 and 2011 Bortz surveys. So these
4 are the same respondents that we're comparing
5 from 2010 to 2011. And we're doing it in just
6 this slide for the sports allocation category.
7 So, in other words, what the sports category
8 was as defined by Bortz.

9 So on the X axis you can see sports
10 2010 is represented there. And those numbers
11 represent percentages. So that's the
12 percentage allocation that a given respondent
13 gave for that survey in that year, for the
14 sports category.

15 And then on the Y axis, you see sports
16 2011. And there you see the same percentages,
17 the same percentage scale. Those represent the
18 answers that a particular respondent gave for
19 the 2011 sports category.

20 Now, what the diagonal line represents
21 there, it is a 45-degree line, and any answers
22 that fall on that line are answers that were
23 the same for the sports category for a
24 particular respondent for the years 2010 versus
25 2011.

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<p>1 And as you can see, most of the dots 2 that are there -- and there are different size 3 dots to represent how many respondents actually 4 fell in that particular data point -- but you 5 can see most of the responses there fall off 6 the diagonal line. What is the meaning of that 7 or the implication of that?</p> <p>8 The implication is that most of the 9 respondents who undertook the 2010 and 2011 10 surveys gave different allocations for the 11 sports category in those two years.</p> <p>12 Q. And this analysis relates only to the 13 sports category between 2010 and 2011. Did you 14 also -- did you do this analysis across all 15 years for all program categories?</p> <p>16 A. I did, for 2010 through 2013, across 17 all of the different programming categories.</p> <p>18 Q. And what did you find?</p> <p>19 A. Well, as you might imagine, since I 20 have just shown you one scatter plot that 21 represents the sports category comparing two 22 years, and we have four years total and then a 23 number of different categories, there are a 24 number of scatter plots that underlie this 40 25 to 50 scatter plots.</p>	<p>1 people said, respondents in the Bortz survey 2 said, for that particular category in terms of 3 the percentage allocation.</p> <p>4 On the Y axis you have the percentage 5 of respondents that gave that particular 6 response.</p> <p>7 And then in the top right corner, you 8 basically have a legend that allows you to see 9 what the differences are between what they said 10 in one year versus the comparator year.</p> <p>11 So in this context, let's focus simply 12 on sports since we have been talking about that 13 quite a bit already.</p> <p>14 In the sports histogram, which is the 15 second from the left, you can see the blue bar 16 represents roughly 20 percent of the 17 respondents comparing one year to the next said 18 the same thing in terms of the allocation they 19 gave to sports, comparing those two years.</p> <p>20 But most of the respondents, roughly 21 80 percent of them, said something different. 22 So they might have said, you know, 30 percent 23 allocation in year one and a 40 percent 24 allocation in year two.</p> <p>25 So where they would fall, essentially,</p>
3404	3406
<p>1 Rather than show all of those, I 2 created a summary slide that basically combines 3 all of that information into one illustrated 4 slide.</p> <p>5 Q. Thank you for that, by the way. I 6 don't think we wanted to see that many scatter 7 plots.</p> <p>8 A. I would think we wouldn't finish me 9 today if we went through 40 or 50 scatter 10 plots.</p> <p>11 So what this represents is -- and I 12 will sort of go through it very slowly because 13 I think there is a lot of information here 14 that's worth detailing.</p> <p>15 Q. Just to be clear for the record, you 16 now have another chart titled Summary of 17 Differences?</p> <p>18 A. Yes. This is the Summary of 19 Differences chart. And, again, it is looking 20 at the Bortz survey data and comparing what 21 respondents said across the different time 22 periods that were done there.</p> <p>23 So on the X axis you can see I have 24 broken out the various programming categories 25 there. So each histogram represents what</p>	<p>1 is in one of those other gray bars with the 2 gray bars, depending on the color of the gray 3 bar, representing the difference in percentage 4 points between what they said in year one 5 versus year two.</p> <p>6 Now, I have circled a portion of that 7 histogram, the red circle that you see there, 8 to represent those respondents that gave at 9 least a 10 percentage point difference in the 10 responses that they gave from year one versus 11 year two comparison in that particular Bortz 12 survey.</p> <p>13 So as you can see across all of the 14 different histograms that we have there 15 representing the different programming types, 16 there are actually quite a few respondents who 17 gave different answers from a comparison of one 18 year to the next.</p> <p>19 Q. And do these scatter plots for all of 20 the programming indicate that the survey 21 respondents answered the purported relative 22 market value question inconsistently over time?</p> <p>23 A. I think it does. And the reason for 24 that is because, as I mentioned just a moment 25 ago, if you look at the blue bar in basically</p>

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<p>1 the first five product categories -- and I 2 don't mention Devotional or Canadian 3 broadcasting, at least because with Canadian 4 broadcasting it's a fairly small sample size -- 5 but with the other categories you see that 6 essentially most of the respondents gave a 7 different answer year-over-year when the 8 comparison was made for any of these other 9 allocations.</p> <p>10 Q. And so slide -- the previous slide was 11 about one category going from one year to the 12 next for the sports category. And this, the 13 slide we're looking at now, is an aggregation 14 of all categories.</p> <p>15 Did you do any additional examination 16 to support the conclusion you are asking us to 17 reach?</p> <p>18 A. Yes. As I said, initially what I try 19 to do when I do an analysis like this is think 20 about it from a pictorial perspective because 21 it helps give useful insight and it is always 22 easier to try and think about things in a 23 picture as opposed to trying to do analytical 24 work right away.</p> <p>25 But I think ultimately what we can</p>	<p>1 whether they're related or unrelated to each 2 other, correlation helps you to gauge that. So 3 you might have two variables that are 4 independent of each other and they would have 5 no correlation.</p> <p>6 You might have two variables that are 7 highly correlated related to each other and 8 they might have a perfect correlation.</p> <p>9 So what does that mean in the context 10 of this proceeding? Well, if respondents gave 11 the same answer to the survey that was done in 12 2010 and then the survey that was done in 2011 13 and that was consistent across all the 14 respondents, we would observe a correlation of 15 1, a perfect correlation. They gave the same 16 answer consistently year-to-year.</p> <p>17 If you don't have a correlation of 1, 18 then obviously you have something less than 19 that. Correlations can range from negative 1 20 to positive 1. What a zero means under that 21 scale is that they don't have any relationship 22 whatsoever. And then correlations fall in 23 between those numbers.</p> <p>24 As you can see with this particular 25 slide, and I will explain what we're looking at</p>
3408	3410
<p>1 bring to the -- or what I can bring to the 2 table is a little bit more rigor in terms of 3 just looking at more than the picture and 4 actually bringing statistics to bear to see if 5 the differences that we observe here are 6 substantial.</p> <p>7 So what I ended up doing was 8 conducting three different statistical 9 analyses. One was a correlational analysis. 10 The other was calculating what's called 11 R-squared or the coefficient of determination.</p> <p>12 And then the last one was actually 13 calculating a statistic called Cronbach's 14 alpha, which I will explain in a moment.</p> <p>15 Q. Okay. Did you create a demonstrative 16 to address the different statistics?</p> <p>17 A. Yes, I did.</p> <p>18 Q. Okay. Let's start with, I think you 19 described it as a correlation analysis?</p> <p>20 A. Yes.</p> <p>21 Q. And could you tell us what that is?</p> <p>22 A. Sure. So before we focus on the 23 chart, let me sort of explain what a 24 correlation analysis is.</p> <p>25 If you think about two variables,</p>	<p>1 before we get into the actual values of the 2 correlations, what I have done here is compared 3 on the X-axis the different years that were 4 available as part of the data from this 5 proceeding.</p> <p>6 So there is, in the left-most corner 7 there, the comparison of 2009 versus 2010. 8 Again, we're talking about the Bortz survey and 9 respondents that participated in both of those 10 years on that survey.</p> <p>11 And then the different colors of the 12 bars that are represented there, as you can see 13 the legend at the bottom, represent the 14 different programming categories that are part 15 of this proceeding.</p> <p>16 The height of the bars, as you see 17 them in the chart, represent the value of the 18 correlation coefficient.</p> <p>19 When you compare it, for example, 20 movies is the first blue bar you see there from 21 2009 to 2010 and you see a value of 22 approximately .12. That's the value of that 23 correlation for that particular programming 24 category.</p> <p>25 As I mentioned a moment ago, perfect</p>

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<p>1 correlation means that the answers that</p> <p>2 respondents gave from, say, 2009 to 2010 were</p> <p>3 the same for a given category. As you can see,</p> <p>4 if you just simply focus on 2009 versus 2010,</p> <p>5 those correlations are all -- well, they</p> <p>6 are .5, a little over .5 or below.</p> <p>7 And if you look across the different</p> <p>8 comparisons that are there, 2009 versus 2011</p> <p>9 and so on, you can see most of the correlations</p> <p>10 are below .5 with many of them being even much</p> <p>11 more -- much lower than that.</p> <p>12 Q. And what do these correlations tell</p> <p>13 you about the consistency over time of the</p> <p>14 answers given by the same CSOs in the Bortz</p> <p>15 survey?</p> <p>16 A. This analysis gives me the insight</p> <p>17 that respondents over time -- again, the same</p> <p>18 CSOs over time -- aren't giving the same</p> <p>19 answers over the time periods. So, in other</p> <p>20 words, they are being inconsistent.</p> <p>21 Q. You also did an analysis which I think</p> <p>22 you referred to as the R-squared. What is</p> <p>23 that?</p> <p>24 A. Well, R-squared is a measure of the</p> <p>25 relationship, again, between two variables.</p>	<p>1 most of the R-squares are below -- all of the</p> <p>2 R-squares are below 50 percent or .5, and most</p> <p>3 below 30 percent or .3. What does that mean?</p> <p>4 That basically means that one variable</p> <p>5 has very little explanatory power or not much</p> <p>6 explanatory power in the context of explaining</p> <p>7 another variable.</p> <p>8 If I give you the value for what</p> <p>9 somebody said an allocate -- or what a</p> <p>10 collection of people said an allocation was for</p> <p>11 one year, you wouldn't have strong relationship</p> <p>12 in terms of saying what the value for that</p> <p>13 allocation would be the following year.</p> <p>14 Q. And the third analysis I think you</p> <p>15 mentioned was the Cronbach alpha.</p> <p>16 A. Yes.</p> <p>17 Q. What is that analysis?</p> <p>18 A. Well, in the context of -- and this is</p> <p>19 typical in survey research -- you want your</p> <p>20 surveys to be internally consistent, which</p> <p>21 means that when you ask questions that are</p> <p>22 getting at the same uni-dimensional construct,</p> <p>23 you want them to be basically giving you</p> <p>24 something that's internally consistent.</p> <p>25 In other words, they are basically</p>
3412	3414
<p>1 Oftentimes it is used in conjunction with a</p> <p>2 regression analysis.</p> <p>3 What it basically measures or</p> <p>4 represents is how much of the movement in one</p> <p>5 variable can be explained by the movement in</p> <p>6 another variable.</p> <p>7 So it is very useful or very helpful</p> <p>8 to indicate, well, just how much of a</p> <p>9 relationship or dependency is there from one</p> <p>10 variable, comparing one variable to another.</p> <p>11 Q. And do you have a graphical</p> <p>12 representation of your R-squared analysis?</p> <p>13 A. Yes, I do. The next chart that we're</p> <p>14 putting up that is entitled Coefficient of</p> <p>15 Determination, or R-Squared, is a very similar</p> <p>16 chart to what you saw before in terms of what's</p> <p>17 conveyed here, although it is focused instead</p> <p>18 on -- instead of on correlation, on the</p> <p>19 R-squared.</p> <p>20 So the setup is the same. You have</p> <p>21 these across the X axis different comparisons</p> <p>22 year-to-year. The different colors of the bars</p> <p>23 represent the programming categories. And then</p> <p>24 the height of the bars represent the R-squared.</p> <p>25 And as you can see from this slide,</p>	<p>1 getting the same answers with these separate</p> <p>2 questions you are asking about this</p> <p>3 uni-dimensional construct.</p> <p>4 So in the context of Cronbach's alpha,</p> <p>5 that's a statistic that allows you to measure</p> <p>6 whether two questions or more than two</p> <p>7 questions are internally consistent.</p> <p>8 And as part of what's been developed</p> <p>9 for this particular statistic, there is</p> <p>10 actually a scale that researchers use to say:</p> <p>11 Well, given your value of Cronbach's alpha, is</p> <p>12 this an acceptable level of internal</p> <p>13 consistency?</p> <p>14 Q. And what did you find when you</p> <p>15 performed that statistic?</p> <p>16 A. Well, I prepared a slide similar to</p> <p>17 the ones that you see here in terms of breaking</p> <p>18 out the comparisons year-to-year and then by</p> <p>19 the different programming categories.</p> <p>20 What I have also done here, I</p> <p>21 mentioned just a moment ago that there is</p> <p>22 actually a scale that survey researchers or</p> <p>23 researchers in general, who avail themselves of</p> <p>24 the use of the Cronbach alpha statistic, use to</p> <p>25 determine whether the value of that statistic</p>

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<p style="text-align: right;">3415</p> <p>1 is something that gives you insight into 2 whether there is internal consistency or not. 3 And I have basically put that scale as 4 sort of the backdrop of this slide. And you 5 will see on the right-most part of the slide 6 the different categories that are going there, 7 everything from unacceptable all the way up to 8 excellent. 9 And you will see that most of the bars 10 fall under the questionable, poor, and 11 unacceptable category, with just a couple being 12 an acceptable or good, meaning that the values 13 of the Cronbach alpha for these different 14 programming categories comparing two different 15 years basically show there is a lack of 16 internal consistency. 17 Q. And so what's your overall conclusion 18 with regard to the statistics of the 19 correlation analysis, the R-squared, and the 20 Cronbach alpha analysis with respect to the 21 Bortz survey respondent -- the Bortz survey 22 respondents' responses to the relative market 23 value question? 24 A. That those statistical analyses are 25 basically confirming or validating what was</p>	<p style="text-align: right;">3417</p> <p>1 for there to be a movement in the underlying 2 relative market value. 3 Q. I believe Mr. Trautman has testified 4 that the Bortz survey bottom-line results are 5 consistent from year-to-year. 6 If the bottom-line results are 7 consistent, why worry about what the internal 8 allocations are? 9 A. Well, it is important to understand 10 that when you're talking about those aggregate 11 results, they are coming from these underlying 12 CSOs. Each observation is going into that 13 aggregate and obviously contributing to 14 whatever that aggregate value is. 15 What I have observed through these 16 various analyses is that there appears to be 17 inconsistencies in the answers that the 18 respondents are giving. Each of those 19 inconsistencies then is being built up into 20 this aggregate, making the aggregate, while it 21 may not change over time, unreliable 22 nonetheless. 23 Q. And did you perform any additional 24 analysis besides just looking at the Bortz 25 respondents' responses?</p>
<p style="text-align: right;">3416</p> <p>1 observed with the scatter plots, that we see in 2 most cases respondents not giving the same 3 answers and, therefore, being inconsistent in 4 the answers that they give from comparisons of 5 one survey to the next. 6 Q. Now, could the lack of consistency be 7 due to changes in the underlying relative 8 market value of these different programming 9 categories? 10 A. So remember what the Bortz survey is 11 purporting to measure here. There is a 12 relative market value that underlies what is 13 being stated in the marketplace in terms of 14 these surveys. 15 And so the question is, does the 16 underlying value move, is it variable enough to 17 suggest that there should be changes in these 18 percentage allocations over time because the 19 underlying values are moving over time. 20 I, frankly, have seen no evidence to 21 suggest that. With that said, it is certainly 22 possible that that could be happening from time 23 to time. I wouldn't expect it to be a global 24 phenomena, but there could be instances where 25 there might be for a specific CSO some reason</p>	<p style="text-align: right;">3418</p> <p>1 A. I did. So one of the issues that was 2 just raised was perhaps the underlying relative 3 market value could change over time for a given 4 CSO, for whatever reason. They might have 5 decided to change the programming that they 6 have decided to rebroadcast, whatever the case 7 may be. 8 So in that context then, something 9 happens over time, and just simply looking at 10 the Bortz surveys over time doesn't give us the 11 ability to control for that. 12 But we do have data that has been 13 produced as part of this proceeding that would 14 help us to understand or at least control for 15 some time component and changes over time. And 16 that's the use of the Horowitz survey in the 17 context of a comparison to the Bortz survey. 18 Q. With regard to the Horowitz survey, 19 the Horowitz survey and the Bortz survey are 20 not -- don't use -- are slightly different, at 21 least some would say? 22 A. It is my understanding that the 23 Horowitz survey was intended to mimic the Bortz 24 survey with some exceptions. And my 25 understanding of those exceptions were that Mr.</p>

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<p>3419</p> <p>1 Horowitz had determined that there were certain 2 flaws with the Bortz survey that could be 3 corrected or at least addressed with his 4 survey, and that's what he did. 5 Q. And then the Horowitz survey has an 6 additional category, program category, does it 7 not? 8 A. Yes, in the context of, I believe, the 9 sports category, yes. 10 Q. And so in making -- in comparing the 11 two surveys, did you -- what did you do to make 12 them comparable? 13 A. Well, as I said, the Horowitz survey, 14 it was my understanding, was intended to mimic 15 the Bortz survey. One of the places it didn't 16 was how it defines the sports category. We 17 looked at this a little earlier in my 18 testimony. 19 What the Horowitz survey did was it 20 broke out this other sports category that was 21 meant to include the sports that aren't covered 22 under live professional and college team 23 sports, and then explicitly address that as a 24 separate category for the purposes of asking 25 survey respondents how they would allocate to</p>	<p>3421</p> <p>1 A. Sure. 2 MR. OLANIRAN: The underlying 3 document, Your Honor, for this particular 4 graphic, I think, was restricted. And I don't 5 know if the parties have an objection to 6 continuing. I think there are only two people 7 that I'm aware of, but they are both clients, 8 if you will. 9 JUDGE BARNETT: Well, the issue is how 10 much detail goes into the record and is made 11 available to the public. If it is restricted, 12 then it is restricted. If it isn't, then it 13 can be in the open record. 14 MR. OLANIRAN: I think I would say 15 some of it is restricted, but it's just that 16 one slide, and we can go in camera until that 17 is concluded. 18 But the parties, Mr. David Driscoll 19 and Andrea Dominchek are both from the Motion 20 Pictures Association, and they actually are our 21 clients. 22 JUDGE BARNETT: And are privy to this 23 information by virtue of their positions? 24 MR. OLANIRAN: I believe so, yes, Your 25 Honor.</p>
<p>3420</p> <p>1 that category. 2 Q. And how did you treat this difference 3 in your comparison? 4 A. Well, it is my opinion that the 5 Horowitz way of doing it, in other words, 6 taking live sports separate from other sports, 7 those are both subsets of the overall category 8 that Bortz defined. That was the purpose of 9 what Horowitz did in terms of breaking it out. 10 So by adding those two categories from 11 Horowitz, the live team sports category and the 12 other sports category together, we could get 13 what I called a combined sports category that 14 would allow me to compare it then directly to 15 the Bortz sports category as he defined it. 16 Q. And do you have an example of a CSO 17 where you compared the Bortz and Horowitz 18 surveys? 19 A. Yes. So one of the larger CSOs is 20 Charter Communications. And so I prepared a 21 slide that did a scatter plot for Charter 22 Communications. 23 Now, this, this scatter plot -- 24 Q. Dr. Stec, may I put you on hold for a 25 second?</p>	<p>3422</p> <p>1 JUDGE BARNETT: Okay. We will mark 2 this portion of the transcript as restricted 3 then until you get past this exhibit. And 4 close the door in an abundance of caution so 5 that no one wanders in. 6 (Whereupon, the trial proceeded in 7 confidential session.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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<p style="text-align: right;">3427</p> <p>1 O P E N S E S S I O N</p> <p>2 BY MR. OLANIRAN:</p> <p>3 Q. I think I was asking you about, you</p> <p>4 were answering the question with regard to the</p> <p>5 size of the differences, right?</p> <p>6 A. Yes.</p> <p>7 Q. Please go ahead.</p> <p>8 A. And so this is a slide that basically</p> <p>9 looks at all of the CSOs across all of the</p> <p>10 different programming categories.</p> <p>11 So, again, these are matched CSOs.</p> <p>12 These are CSOs that did the Bortz survey and</p> <p>13 the Horowitz survey in the same year.</p> <p>14 And as you can see, most of those CSOs</p> <p>15 gave different allocation percentages in the</p> <p>16 Bortz survey versus the Horowitz survey across</p> <p>17 the different programming categories that you</p> <p>18 see there.</p> <p>19 Q. And so do these scatter plots for all</p> <p>20 programming indicate, of all the different</p> <p>21 programming categories, indicate that survey</p> <p>22 respondents answered the purported relative</p> <p>23 market value question inconsistently when the</p> <p>24 question is asked about the same time period?</p> <p>25 A. That's correct.</p>	<p style="text-align: right;">3429</p> <p>1 of them being well below .5.</p> <p>2 Now, I will refresh your recollection.</p> <p>3 A perfect correlation in this context means</p> <p>4 that a respondent gave the same answer in the</p> <p>5 Bortz survey -- or a collection of respondents</p> <p>6 gave the same answer in the Bortz survey versus</p> <p>7 the Horowitz survey. We're not finding</p> <p>8 anything like that here.</p> <p>9 And that to me is especially relevant</p> <p>10 because we are trying to control for time,</p> <p>11 we're doing it in the same year, controlling</p> <p>12 obviously for respondent, we're matching the</p> <p>13 respondents, and then we're looking at the</p> <p>14 program categories.</p> <p>15 So this, I think, addresses the issue</p> <p>16 can things be changing over time. They can't</p> <p>17 in this context because we're focused on the</p> <p>18 same period of time when we do these</p> <p>19 comparisons.</p> <p>20 Q. And with regard to the R-squared</p> <p>21 analysis, what did you find?</p> <p>22 A. The next chart summarizes what I found</p> <p>23 there. Remember, the R-squared is a measure of</p> <p>24 what the relationship is in terms of explaining</p> <p>25 the movement in one variable versus the</p>
<p style="text-align: right;">3428</p> <p>1 Q. And overall, again, what does this</p> <p>2 suggest to you?</p> <p>3 A. Well, this, again, is my first pass at</p> <p>4 looking at a comparison of the Horowitz and</p> <p>5 Bortz surveys in a pictorial way. I did the</p> <p>6 same type of statistical analyses that I did</p> <p>7 when we focused simply on the Bortz data for</p> <p>8 this Bortz versus Horowitz data as well.</p> <p>9 Q. And I recall those were the</p> <p>10 correlation analysis, the R-squared and the</p> <p>11 Cronbach alpha statistics, right?</p> <p>12 A. That's correct.</p> <p>13 Q. And let's start with the correlation</p> <p>14 analysis. What did you find in that regard?</p> <p>15 A. Well, if we could put up the slide</p> <p>16 that basically summarizes the results of that</p> <p>17 analysis.</p> <p>18 And, again, this is broken out by year</p> <p>19 comparing in one year the Bortz survey</p> <p>20 allocations versus the Horowitz survey</p> <p>21 allocations, and then obviously breaking it out</p> <p>22 with the different colored bars there by the</p> <p>23 programming categories.</p> <p>24 And as you can see in this context,</p> <p>25 all of the correlations are below .5 with many</p>	<p style="text-align: right;">3430</p> <p>1 movement in another variable.</p> <p>2 So in this context it is the Bortz</p> <p>3 versus the Horowitz comparison.</p> <p>4 And here you can see all of the</p> <p>5 R-squares are below .2. So less than</p> <p>6 20 percent of what's being -- what the movement</p> <p>7 in one variable is being explained by the</p> <p>8 other.</p> <p>9 And, again, that's a relatively low</p> <p>10 R-squared. In other words, not a lot -- there</p> <p>11 is not a strong relationship between these two</p> <p>12 variables.</p> <p>13 Q. And the last variable was -- the last</p> <p>14 statistic was Cronbach's alpha.</p> <p>15 A. Yes.</p> <p>16 Q. And what did you find with regard to</p> <p>17 the CSO, the Bortz/Horowitz CSO respondents,</p> <p>18 what did you find when you performed that</p> <p>19 statistic?</p> <p>20 A. I prepared another chart, if we could</p> <p>21 put that up. And, again, the backdrop here is</p> <p>22 the different -- is the scale that's been</p> <p>23 adopted by researchers to gauge Cronbach alpha</p> <p>24 values and whether they imply internal</p> <p>25 consistency or not.</p>

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3431	<p>1 And you can see in all of these</p> <p>2 comparisons, the bars are in the questionable</p> <p>3 category or below, suggesting that across all</p> <p>4 of the different programming categories for all</p> <p>5 of the different years, there is a question of</p> <p>6 internal consistency. This suggests there</p> <p>7 isn't.</p> <p>8 Q. So, Dr. Stec, you did the Bortz versus</p> <p>9 Bortz survey responses. You thought the</p> <p>10 responses were inconsistent, correct?</p> <p>11 A. Correct.</p> <p>12 Q. And then you also performed the Bortz</p> <p>13 versus Horowitz CSOs that were common to both</p> <p>14 samples and you also concluded that the</p> <p>15 responses were, were inconsistent?</p> <p>16 A. That's correct.</p> <p>17 Q. And the basis, I recall, for that was</p> <p>18 because you didn't think the respondents</p> <p>19 understood the question and, even if they did,</p> <p>20 they weren't qualified to respond, to respond</p> <p>21 to the survey. Is that right?</p> <p>22 A. That's correct. This suggests that</p> <p>23 the respondents, because they are giving</p> <p>24 different answers even within the same calendar</p> <p>25 year, aren't qualified to come up with these</p>	3433	<p>1 go beyond just simply looking at the data. And</p> <p>2 it has to do with the methodology that's</p> <p>3 actually employed by the Bortz survey for the</p> <p>4 purposes of coming up with these allocations.</p> <p>5 One --</p> <p>6 Q. What do you mean by that? I'm sorry.</p> <p>7 Go ahead.</p> <p>8 A. One particular aspect of it is the</p> <p>9 Bortz survey doesn't represent market</p> <p>10 equilibrium, doesn't represent market prices in</p> <p>11 a market that has -- that is unregulated.</p> <p>12 Instead, it represents a willingness</p> <p>13 to pay measure. That is not the same as market</p> <p>14 price or market equilibrium. That's one issue.</p> <p>15 The other issue is within the context</p> <p>16 of the Bortz survey, there is no accounting for</p> <p>17 the supply side of the market. So when you</p> <p>18 think about a typical market in an economic</p> <p>19 sense, you have a demand side, what consumers</p> <p>20 might demand of a particular good or service,</p> <p>21 but then you also have the supply side.</p> <p>22 The Bortz survey doesn't address the</p> <p>23 supply side at all, but that's an important</p> <p>24 part of the market that you need to address to</p> <p>25 come up with market prices and relative market</p>
3432	<p>1 particular answers because they don't think</p> <p>2 about these allocations or don't have</p> <p>3 experience with these type of allocations in</p> <p>4 their ordinary course of business.</p> <p>5 Q. So if we assume that they did</p> <p>6 understand the question and that they were</p> <p>7 qualified to respond to the questions, is there</p> <p>8 any way to find the Bortz results as evidence</p> <p>9 of relative marketplace value?</p> <p>10 A. So if you ask me to put to the side</p> <p>11 the results of these analyses, the comparison</p> <p>12 that I did in terms of the Bortz and Horowitz</p> <p>13 survey or just the Bortz survey itself, which</p> <p>14 suggests there are significant inconsistencies</p> <p>15 here, even if that's all put to the side and we</p> <p>16 don't address it, there is evidence to suggest</p> <p>17 there is a problem here.</p> <p>18 That, nonetheless, even not</p> <p>19 considering what we just went through, would</p> <p>20 still not mean the Bortz survey is giving or is</p> <p>21 able to give insight into the relative market</p> <p>22 value phenomena that we're trying to address</p> <p>23 here.</p> <p>24 Q. And why do you say that?</p> <p>25 A. Well, there are a couple issues that</p>	3434	<p>1 value.</p> <p>2 Q. Let's stick to the market equilibrium</p> <p>3 question. What do you mean by that?</p> <p>4 A. Well, I prepared a slide that</p> <p>5 hopefully, again, I like sort of referring to</p> <p>6 graphics or pictorials, that hopefully</p> <p>7 illustrates what I mean by the market price or</p> <p>8 market equilibrium not is what the Bortz survey</p> <p>9 is addressing in the context of its</p> <p>10 methodology.</p> <p>11 So if we could put up the next slide,</p> <p>12 this is a simple diagram of what most of us</p> <p>13 think of, probably most of us encountered if</p> <p>14 you took Econ 101 in terms of what market</p> <p>15 demand and market supply look like.</p> <p>16 So the downward sloping blue curve</p> <p>17 there is market demand. The upward sloping red</p> <p>18 curve there is market supply.</p> <p>19 Now I have drawn in a few more pieces</p> <p>20 of information in this particular chart. Let's</p> <p>21 first note what the axes are. So on the Y</p> <p>22 axis, that is price. On the X axis, that is</p> <p>23 quantity.</p> <p>24 And where it says market equilibrium,</p> <p>25 same place where market supply and market</p>

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3435	<p>1 demand intersect, that's the market price. So</p> <p>2 if you draw that green horizontal line to the Y</p> <p>3 axis, you will see that would represent the</p> <p>4 market price here.</p> <p>5 Now, what is the Bortz survey getting</p> <p>6 at? Well, it is a willingness to pay measure</p> <p>7 that ultimately is being derived from the</p> <p>8 survey.</p> <p>9 So what is willingness to pay in the</p> <p>10 context of this diagram? Well, it is the dark</p> <p>11 blue part of the demand curve there where I</p> <p>12 have an arrow pointing, willingness to pay.</p> <p>13 Now, what does that mean in terms of</p> <p>14 market price and market equilibrium? Well,</p> <p>15 typically respondents -- well, not respondents,</p> <p>16 just consumers in the marketplace, are willing</p> <p>17 to pay more for a particular product than what</p> <p>18 market price says they have to pay.</p> <p>19 So in those instances, those consumers</p> <p>20 are able to capture their consumer surplus</p> <p>21 because they would be willing to pay something</p> <p>22 higher, but they don't have to because the</p> <p>23 market price is lower.</p> <p>24 Well, what the Bortz survey is</p> <p>25 deriving for us in the context of the survey is</p>	3437	<p>1 I can go into it in more detail, but</p> <p>2 the bottom line is --</p> <p>3 JUDGE STRICKLER: In a price</p> <p>4 discriminatory situation?</p> <p>5 THE WITNESS: Well, no, I'm just</p> <p>6 simply saying in terms of where you have to be</p> <p>7 on a demand curve for each of these categories,</p> <p>8 programming categories, you basically have to</p> <p>9 be on the demand curve where the elasticity is</p> <p>10 going to be the same for each of the program</p> <p>11 allocations.</p> <p>12 And that's a very specialized portion</p> <p>13 of the demand curve. It would be -- it would</p> <p>14 be, I think, unusual to be on the right part of</p> <p>15 the demand curve for each of the program</p> <p>16 allocations to get it to work out that way.</p> <p>17 Moreover, the demand curve is likely</p> <p>18 changing, the elasticity is changing where you</p> <p>19 are in the demand curve, so you might only be</p> <p>20 there for a very brief moment in time before</p> <p>21 you move away and then you don't have this</p> <p>22 relative allocation being -- or the relative</p> <p>23 market price being the same as the relative</p> <p>24 willingness to pay.</p> <p>25 JUDGE STRICKLER: Thank you.</p>
3436	<p>1 a willingness to pay measure, not a market</p> <p>2 price or a market equilibrium measure. There</p> <p>3 is a difference there.</p> <p>4 And the difference suggests that the</p> <p>5 willingness to pay is going to be higher than</p> <p>6 the market price.</p> <p>7 JUDGE STRICKLER: But is the standard</p> <p>8 a market price or a relative market value?</p> <p>9 THE WITNESS: Well, relative market</p> <p>10 value is going to be the context of a ratio of</p> <p>11 market prices. Right? So ultimately comparing</p> <p>12 what a price might be for one program category</p> <p>13 versus another programming category.</p> <p>14 JUDGE STRICKLER: In the context of a</p> <p>15 constant sum survey, wouldn't the consumer</p> <p>16 surplus be in some sense analogous to the</p> <p>17 proportionate value, rather than a price?</p> <p>18 THE WITNESS: Well, what you're</p> <p>19 assuming with the proportion -- so willingness</p> <p>20 to pay, if you took relative willingness to</p> <p>21 pay, which is what at least was purported to be</p> <p>22 derived from the Bortz survey, that relative</p> <p>23 willingness to pay is only going to be equal to</p> <p>24 the relative market prices in very specialized</p> <p>25 circumstances.</p>	3438	<p>1 BY MR. OLANIRAN:</p> <p>2 Q! And are there any other problems with</p> <p>3 just using a willingness to pay measure derived</p> <p>4 from the Bortz survey?</p> <p>5 A. Yes, there is another issue. And this</p> <p>6 is more survey-specific. So this next slide</p> <p>7 builds off of what we were just looking at a</p> <p>8 moment ago.</p> <p>9 So let me explain a little bit. You</p> <p>10 are familiar with market demand/market supply.</p> <p>11 We have already talked a little bit about that</p> <p>12 on the previous slide.</p> <p>13 What survey researchers have found,</p> <p>14 what economists have found, when you start to</p> <p>15 ask people about what they would be willing to</p> <p>16 pay for any good or service, for that matter,</p> <p>17 in the context of a survey, you're basically</p> <p>18 asking them what their price would be in that</p> <p>19 context. But they are not actually acting in</p> <p>20 the marketplace and paying that price.</p> <p>21 So what's -- a phenomena that has been</p> <p>22 introduced in this context, recognized in this</p> <p>23 context, is hypothetical bias.</p> <p>24 Consumers oftentimes say they are</p> <p>25 willing to pay more for a particular good or</p>

<p style="text-align: right;">3439</p> <p>1 service than they actually would if you put 2 them in the marketplace and actually had them 3 use their own resources to buy the good or 4 service. 5 So this happens, I do a number of 6 different surveys trying to get at willingness 7 to pay, and one of the things that you try to 8 control for or account for is what people say 9 isn't always what they are going to do. 10 And what researchers have found in 11 this context is oftentimes the willingness to 12 pay as derived from a survey is going to be 13 higher than the actual willingness to pay if 14 you put the respondent or collection of 15 respondents in the marketplace and told them to 16 use their own resources to purchase the good or 17 service. 18 JUDGE FEDER: Excuse me. 19 Dr. Stec, I am having a little 20 difficulty visualizing how that plays out in a 21 constant sum survey where the respondents were 22 asked to apportion percentages. 23 It can't go over 100 percent. So how 24 does this work? 25 THE WITNESS: So this is what</p>	<p style="text-align: right;">3441</p> <p>1 example, that in a Bortz interview that the 2 first go-around when the respondents have 3 allocated and the total allocation comes to 4 less than 100 percent, let's say 70 percent, 5 and the respondent was forced to reallocate so 6 that they get to 100 percent, what -- how would 7 you -- how would you respond to -- how would 8 you characterize an occurrence such as that? 9 A. Well, in those situations obviously 10 the constraint is what's driving their 11 allocation behavior. And they originally came 12 up with whatever values they came up with that 13 didn't add to 100 percent. Presumably at least 14 they would say those are the values they 15 believe are accurate. 16 And so in that context then they are 17 changing what their answers would be to match 18 the requirements of having something that adds 19 up to 100 percent. 20 Q. And back to the graph with respect to 21 -- would you please describe for the record 22 exactly what we're looking at as distinguished 23 from the previous graph? 24 A. Sure. So the only thing I have added 25 to this graph is what I am calling reported</p>
<p style="text-align: right;">3440</p> <p>1 typically happens in those particular contexts. 2 The respondent will gravitate to one or more 3 categories that they might be most familiar 4 with. And in this context, they are likely to 5 over-report the willingness to pay in those 6 categories. 7 Now, as you just noted, these things 8 have to sum to 100 percent. So what that 9 likely means in some of these, call them 10 secondary categories, that they are going to 11 underestimate what those percentages are. 12 So they have overestimated what the 13 percentages are in the categories they have 14 focused on. And then because it all has to add 15 up to 100 in the remainder of the categories, 16 call them secondary categories, they have 17 underestimated what those percentages are. 18 The point is that they have not given 19 reliable information, they have not given 20 accurate values, because of this hypothetical 21 bias. 22 JUDGE FEDER: Thank you. 23 BY MR. OLANIRAN: 24 Q. And just a quick follow-up on the 25 constant sum. If, for example, assume, for</p>	<p style="text-align: right;">3442</p> <p>1 market demand there. That's an additional 2 demand curve. You can look at the blue market 3 demand curve as the demand curve for this 4 marketplace for consumers if they were actually 5 in the marketplace and I was forcing them to 6 use their own resources to purchase whatever 7 they are going to purchase. 8 Now, I want to ask them about what 9 they would do in this marketplace, so don't put 10 them in the marketplace, just simply ask them 11 what they would do. 12 Hypothetical bias or the phenomena of 13 hypothetical bias suggests that that red demand 14 curve that's to the right of the blue demand 15 curve would be the demand curve that would be 16 estimated in a survey asking them what they 17 would do as opposed to gauging what they 18 actually do. 19 Q. And is it your testimony that the 20 Bortz survey should somehow have accounted for 21 hypothetical bias? 22 A. My suggestion is that hypothetical 23 bias is likely present. It is a 24 well-researched phenomena. But the Bortz 25 survey does nothing that I can see anyway that</p>

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<p style="text-align: right;">3443</p> <p>1 tries to control or address it.</p> <p>2 Q. And what's the implication for not</p> <p>3 trying to control or address it?</p> <p>4 A. That the percentage allocations that</p> <p>5 are estimated as part of the Bortz survey are</p> <p>6 likely to be unreliable. They are not likely</p> <p>7 to be accurate.</p> <p>8 JUDGE STRICKLER: Would you say, sir,</p> <p>9 that what the Bortz survey is measuring, I know</p> <p>10 you said willingness to pay, would you say it</p> <p>11 is measuring willingness to pay in a regulated</p> <p>12 setting where the fees are a function of</p> <p>13 something completely different because they are</p> <p>14 not buying the individual programs, so that it</p> <p>15 is revealing to us willingness to pay relative</p> <p>16 amounts in a regulated setting as opposed to</p> <p>17 giving us relative market values or prices in</p> <p>18 an unregulated hypothetical market?</p> <p>19 THE WITNESS: I think that's a good</p> <p>20 question. The way I would answer it is this:</p> <p>21 What do the survey respondents have experience</p> <p>22 with? We know that they don't have experience</p> <p>23 in an unregulated market because it doesn't</p> <p>24 exist.</p> <p>25 So the experience that they bring to</p>	<p style="text-align: right;">3445</p> <p>1 the experience they have with these particular</p> <p>2 signals and the programming that's associated</p> <p>3 with these signals.</p> <p>4 JUDGE STRICKLER: Do you think there</p> <p>5 is some sort of a barrier that they can't --</p> <p>6 that is not permeable, they can't take their</p> <p>7 knowledge about how they value programming in</p> <p>8 an unregulated market, which they have</p> <p>9 experience in, and transfer it over to the</p> <p>10 regulated market in the context of answering</p> <p>11 Question 4 in the Bortz survey?</p> <p>12 THE WITNESS: Well, it is my</p> <p>13 understanding that the markets are different.</p> <p>14 So if it is the unregulated market in which</p> <p>15 they can purchase the rights to certain</p> <p>16 programming content, whatever the case may be,</p> <p>17 it is my understanding they have the ability to</p> <p>18 advertise, for example, using that with that</p> <p>19 programming. They don't have that ability with</p> <p>20 these retransmitted signals.</p> <p>21 And so that could certainly affect the</p> <p>22 value of the different programs or how they</p> <p>23 might allocate the value to these different</p> <p>24 programs.</p> <p>25 So that would be certainly one thing I</p>
<p style="text-align: right;">3444</p> <p>1 bear in answering these questions is based on a</p> <p>2 regulated market.</p> <p>3 So my first answer to your question</p> <p>4 would be that ultimately if they are able to</p> <p>5 answer these questions at all, given the</p> <p>6 experience that they have, it has to be based</p> <p>7 on experience that they have in a regulated</p> <p>8 market.</p> <p>9 I understand that the Bortz survey and</p> <p>10 the Horowitz survey may be trying to get at</p> <p>11 what these percentage allocations would be in</p> <p>12 an unregulated market, but then I would turn</p> <p>13 to, well, what experience do these respondents</p> <p>14 have in a market like that to be able to answer</p> <p>15 those questions? And I think the answer is</p> <p>16 none.</p> <p>17 JUDGE STRICKLER: Don't they have some</p> <p>18 experience with regard to an unregulated market</p> <p>19 with regard to buying other channels or</p> <p>20 stations that are not distantly retransmitted</p> <p>21 and are subject to an unregulated market?</p> <p>22 THE WITNESS: My understanding is that</p> <p>23 they do. But we're focused here on distant</p> <p>24 signals that are retransmitted as part of this</p> <p>25 market. And so in that context then, that's</p>	<p style="text-align: right;">3446</p> <p>1 would consider. Another thing I would consider</p> <p>2 is I think the overall expenditures in this</p> <p>3 particular marketplace are relatively small,</p> <p>4 the retransmitted distant signal marketplace.</p> <p>5 So there is a question of whether or</p> <p>6 not, because the marketplace is so small, that</p> <p>7 these allocations would be different for that</p> <p>8 reason as well.</p> <p>9 JUDGE STRICKLER: Are you concerned at</p> <p>10 all that the allocations would be -- that there</p> <p>11 wouldn't be a whole lot of thought process even</p> <p>12 going into it in the first place because it is</p> <p>13 so small as to be de minimis?</p> <p>14 THE WITNESS: That's certainly a</p> <p>15 concern. And certainly some of what I have</p> <p>16 observed with some of these analyses that I</p> <p>17 have done comparing the surveys over time,</p> <p>18 there certainly seems to be respondent-related</p> <p>19 error involved. And that could certainly be an</p> <p>20 explanation for it.</p> <p>21 JUDGE STRICKLER: The de minimis</p> <p>22 aspect could explain the variation that you</p> <p>23 showed us?</p> <p>24 THE WITNESS: Yes, I think that's a</p> <p>25 possibility.</p>

<p style="text-align: right;">3447</p> <p>1 JUDGE STRICKLER: I don't know if it 2 is going to matter much at all, but on a 3 technical point with regard to the slide you 4 have in front of you now, you have a market 5 supply. But the supply of goods that we're 6 talking about are copies of programs that have 7 already been produced. 8 So they don't have any marginal cost 9 attached to them because they have already been 10 produced. Any cost they would have would be in 11 substance an opportunity cost alone, right, 12 because it doesn't cost any more to make a copy 13 and transmit a copy. Those costs are 14 reasonably low, right? 15 THE WITNESS: Well, there is a cost 16 involved with actually acquiring the rights to 17 retransmit the program, right? 18 JUDGE STRICKLER: But in this 19 unregulated market, there is only -- there is 20 no cost on the supply side. The program's 21 already been created and done. There is no -- 22 there is no, in a static sense, there is no 23 supply curve at all. 24 And wouldn't the -- wouldn't the price 25 be determined on a willingness to pay basis</p>	<p style="text-align: right;">3449</p> <p>1 A. Well, the Bortz survey, as far as I 2 could tell, didn't specify a supply side of the 3 market at all. So, in other words, what it did 4 was it took a random sample of CSOs for a given 5 year and asked them the survey questions that 6 we're familiar with but then left it at that. 7 So they addressed the buyer's side of 8 the market but they never addressed the 9 seller's side of the market in terms of trying 10 to determine what a willing seller might do in 11 the context of licensing or making available 12 the programming content. 13 Q. And why is that important? 14 A. Well, because -- and we can sort of 15 look at this chart -- if you go back to the 16 slide before, we can look at this chart and 17 simply put what the Bortz survey is doing, at 18 least ostensibly, is trying to trace out what 19 market demand is. 20 But it is not saying anything about 21 market supply. If you don't have the 22 confluence of both of those curves, you can't 23 say what market price was for any given 24 category. And you certainly can't say what 25 relative value would be across two different</p>
<p style="text-align: right;">3448</p> <p>1 based on everybody's willingness, every 2 potential transmitter's willingness to pay for 3 the program? 4 THE WITNESS: Yeah, I am not sure 5 about that. I agree with you, I think, that 6 the cost of production would already have been 7 incurred. I think that's what you are saying. 8 JUDGE STRICKLER: Exactly. 9 THE WITNESS: But with respect to 10 other costs that might be involved, whether it 11 be some type of administrative cost because you 12 have to take into account negotiations, for 13 example, that might take place between willing 14 buyers and willing sellers and that has to be 15 accounted for in some way as a cost, or various 16 other costs, I think that would probably come 17 into play at least to some extent. 18 JUDGE STRICKLER: Thank you. 19 BY MR. OLANIRAN: 20 Q. Dr. Stec, you spoke earlier about the 21 failure to take into account the supply side of 22 the market. Now, how did the Bortz survey 23 methodology fail to take into account the 24 supply side of the hypothetical unregulated 25 market?</p>	<p style="text-align: right;">3450</p> <p>1 categories. 2 So in that context, without 3 stipulating what market supply might be, you 4 really can't get at a market price. 5 Q. And in this particular context, what 6 would a supply side factor be? 7 A. Well, I mean, you could think about a 8 whole host of supply side factors that have to 9 do with the inputs into the production process 10 of creating a good or service. 11 Or with the aspect of maintaining that 12 good or service and continuing to license it or 13 making it available to respondents -- or to 14 CSOs. 15 In that context then, those different 16 factors would trace out some idea of what 17 supply would be, what's available for 18 respondents, for survey respondents, CSOs, to 19 avail themselves of, and ultimately give you 20 some indication of what market price would be. 21 Q. Let's turn to your review of Dr. 22 Israel's regression analysis, in particular. 23 And does Dr. Israel's regression 24 analysis support the Bortz survey assumption 25 that it represents -- the Bortz survey's</p>

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<p>1 representation as evidence of relative market 2 value? 3 A. No, I don't believe it does. 4 Q. And why doesn't it? 5 A. Well, there are two primary reasons 6 why I believe the Israel -- Dr. Israel's 7 regression does not support the Bortz survey 8 and can't support the Bortz survey if the Bortz 9 survey purports to be what it purports to be. 10 And in that context, the two reasons 11 are, one is that Dr. Israel is relying on 12 transactions from a regulated marketplace. So, 13 in other words, these are transactions between 14 two entities, neither of which is what would be 15 called a willing buyer or willing seller. So 16 it is not an unregulated marketplace. 17 And so in that context then, the 18 seller doesn't have a choice as to what they 19 can receive for their programming content. 20 They are regulated to receive whatever the 21 royalty payment would be, given the terms of 22 the signal that were transmitted. 23 Q. And Dr. Israel used, as part of his 24 analysis, programming minutes. 25 A. Yes, I believe he did.</p>	<p>1 In no calculation that I'm aware of 2 when those royalty payments are being 3 calculated does programming minutes go into it. 4 Yet Dr. Israel is assuming, or at least putting 5 forth that there is some relationship between 6 the royalty payments and the programming 7 minutes that doesn't exist in the regulatory 8 environment. 9 Q. And I think you implied a few minutes 10 ago that under the regulatory scheme, that the 11 participants in the regulatory scheme are 12 compelled to act in a particular way. 13 A. Yes. They are -- they are basically 14 forced by the statute to accept royalty 15 payments that they might not otherwise accept. 16 Q. And could you give an example of how 17 that plays out in the royalty scheme? 18 A. Sure. Some of the data that I'm aware 19 of has CSOs, so CSOs have to pay a minimum 20 royalty regardless of what they choose to 21 transmit or retransmit. 22 And in some contexts, the CSOs pay 23 that royalty amount, even though they choose 24 not to retransmit anything. So they are making 25 a payment and they are not receiving any good,</p>
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<p>1 Q. And do you disagree with his use of 2 that as well? 3 A. Yes, I do. So what Dr. Israel did was 4 he took the royalty payments as a function of a 5 number of different variables in his regression 6 analysis; one of those variables being the 7 amount of programming minutes for a given 8 programming category. 9 And in that context, he estimated the 10 regression based on that to come up with the 11 coefficients that he did. In that context, he 12 is basically saying that the royalty payments 13 are at least being somewhat determined by the 14 programming minutes. 15 But it is my understanding of the 16 regulatory environment here that the program -- 17 that the royalty payments are not a function of 18 the programming minutes. The programming 19 minutes don't go into the calculation of the 20 royalty payments. 21 And instead what goes into it is in a 22 general sense the distant signal equivalents 23 that are transmitted, the number of those, as 24 well as the gross receipts of the CSO that's 25 doing the retransmitting.</p>	<p>1 for lack of a better way of putting it, for 2 that payment. 3 Or in some cases they make a payment 4 but they transmit -- retransmit less than what 5 that payment would entitle them to. You 6 wouldn't observe those phenomena in an 7 unregulated market because what they suggest is 8 you would make a payment and not receive a good 9 or service for it. And that doesn't make any 10 sense in an unregulated market, yet that's 11 exactly what we're seeing in this regulated 12 market. 13 Q. And how do you view that in the 14 context of Dr. Israel's regression analysis? 15 A. It suggests, again, relying on the 16 data that Dr. Israel does from a regulated 17 market can't give us good insight into what 18 would happen in an unregulated market. 19 MR. OLANIRAN: Those are all the 20 questions I have, Your Honor. 21 Thank you, Dr. Stec. 22 THE WITNESS: Thank you. 23 JUDGE BARNETT: Cross-examination? 24 CROSS-EXAMINATION 25 BY MR. ADKINS:</p>

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<p>1 Q. Good afternoon, Dr. Stec. 2 A. Good afternoon. 3 Q. My name is Bryan Adkins, and I 4 represent the Joint Sports Claimants in these 5 proceedings. 6 So I heard you several times in your 7 testimony this afternoon reference information 8 that you received from Ms. Hamilton about the 9 cable industry. 10 A. I wouldn't call it information. It 11 was my review of her testimony. 12 Q. Okay. And have you, yourself, ever 13 worked for a cable system operator? 14 A. To the best of my recollection, no. 15 Q. Okay. And so is your testimony about 16 what cable executives would understand or how 17 cable executives would interpret the different 18 categories in the Bortz survey, that is based 19 on Ms. Hamilton's testimony? 20 A. I would say it is based in part on her 21 testimony, but it is also based on what I 22 observed in some of the analyses that I did 23 that would, I think, confirm her opinions. 24 Q. Okay. And sort of moving on, I'd like 25 to discuss your opinion that the Bortz survey</p>	<p>1 operators of the programming that they are 2 valuing? 3 A. That's basically what it says, yes. 4 Q. Okay. And then if we can move forward 5 to page 34 of your written testimony, and do 6 you see where you say, "these respondent-level 7 measures should be consistent if the Bortz 8 constant sum question is a reliable way to 9 estimate the true value of each allocation 10 percentage for each programming type at each 11 CSO"? 12 A. Yes, I see that. 13 Q. And with respect to the concept of 14 reliable that you use there, I'd like to go 15 back to page 28 in your testimony. 16 A. Okay, I'm there. 17 Q. And here at the top of page 28 you 18 say, "reliability of survey questions is often 19 understood and measured to be consistent 20 results over repeated observations under 21 similar conditions." 22 A. I see that. 23 Q. And so in the year-to-year paired 24 comparisons that you did of the Bortz survey 25 responses, you were just comparing the</p>
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<p>1 results are inconsistent and therefore 2 unreliable. 3 A. Okay. 4 Q. And, first, I'd like to focus on the 5 paired comparisons that you did for systems 6 responding to the Bortz survey in multiple 7 years. 8 A. Okay. 9 Q. And do you have your testimony there? 10 A. I do. 11 Q. If you could turn to page 30 of your 12 written testimony. Geoff, if you could pull 13 that up on the overhead. 14 A. I'm on page 30. 15 Q. Do you see where you say, this is at 16 the top of page 30, "there should be little 17 variation between the percentages given by a 18 CSO in one year's survey when compared to other 19 years' surveys"? 20 A. That's part of a sentence that starts 21 on the previous page, but I do see where that 22 is, yes. 23 Q. And on the previous page you are 24 saying this is based on the assumption that 25 there is a true value for the cable system</p>	<p>1 percentages the system assigned to each program 2 category in the different years? 3 A. I would probably state it a little 4 differently. I was comparing the percentage 5 from a given CSO that was matched for multiple 6 years. And I did that for all of the CSOs that 7 were matched. 8 Q. Okay. So the year-to-year comparisons 9 that you did for Bortz didn't control for other 10 factors, for example, such as whether the 11 systems actually carried the same distant 12 signals in one year to the next? 13 A. That might have been implicit in the 14 calculation but it wasn't explicit. So, in 15 other words, I didn't create a model that 16 explicitly looked at the signals themselves. 17 Q. Right. And the analysis you 18 presented, the paired comparisons, you weren't 19 changing it based on whether the Bortz 20 respondent had the same distant signals in one 21 year to the next, right? 22 A. I was -- I'm not sure what you mean by 23 changing it. 24 Q. So the paired comparisons that you are 25 presenting themselves aren't -- you didn't</p>

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<p style="text-align: right;">3459</p> <p>1 divide up the data, for instance, according to 2 whether this set of respondents had the same 3 distant signals and look at those compared -- 4 those paired comparisons separately from other 5 systems? 6 A. To the best of my recollection, no. 7 Q. Okay. And so now I'd like to ask you 8 about some of the conditions that might change 9 at a cable system from year to year. 10 A. Okay. 11 Q. And would you agree that if a cable 12 system carries different distant signals in one 13 year versus another, that could affect how the 14 cable system values the program categories on 15 the distant signals it's carrying? 16 A. That's a possibility, assuming that 17 the programming content has changed in some 18 way. 19 Q. Sure. And even if the distant signals 20 are the same from one year to the next, the mix 21 of programming content on those signals could 22 change? 23 A. That's possible. I mean, ultimately 24 it is my understanding that cable systems try 25 to retain and attract customers. And part of</p>	<p style="text-align: right;">3461</p> <p>1 system serves could affect how it values 2 different categories of programming? 3 A. That could be a consideration as well, 4 sure. 5 Q. So, for instance, a cable system could 6 have a significantly larger subscriber base 7 from one year to the next? 8 A. That's possible. I wouldn't suggest 9 -- I wouldn't think that would be a global 10 phenomena. It might happen with one CSO or 11 something like that. Certainly not something I 12 would expect to see globally. 13 Q. When you say it might happen with one 14 CSO, you aren't saying that it only happened 15 with one CSO? 16 A. I'm not saying that it happened at 17 all. I'm just simply suggesting that it seems 18 implausible to suggest that the CSOs are going 19 to change, all of them are going to change the 20 number of subscribers they have in a 21 substantial way from one year to the next. 22 Q. But you don't know one way or the 23 other how many changed in one year to the next? 24 A. In terms of the number of subscribers? 25 Q. Right.</p>
<p style="text-align: right;">3460</p> <p>1 what does especially the retaining part of it 2 is keeping a consistent programming mix, such 3 that respondents are going -- or respondents -- 4 customers aren't going to be alienated by 5 changes that basically change what they are 6 viewing. 7 Q. Sure. And in addition to the actual 8 distant signals changing from year to year, it 9 is also possible that the local broadcast 10 signals that the cable system carries could 11 change from year to year? 12 A. So these are broadcast signals that 13 aren't being retransmitted, they are not 14 distant signals is what you are saying? 15 Q. Right. 16 A. That's possible they could change. 17 Q. And, for instance, if a cable system 18 adds a local broadcast signal that has the same 19 or similar content to what's carried on its 20 distant signals, that could affect how the 21 cable system might value the programming on 22 those distant signals? 23 A. It's possible. 24 Q. And would you also agree that a change 25 in the size of the territory that a cable</p>	<p style="text-align: right;">3462</p> <p>1 A. I don't as I sit here, no. 2 Q. Okay. And so if the number of 3 subscribers are changing, that could affect the 4 demographics of the subscriber base? 5 A. It is possible it could. It is also 6 possible that it may not. 7 Q. And what about internal management 8 changes, for instance, from one year to the 9 next, if a cable system undergoes a management 10 change, could that affect how the cable system 11 might approach valuing categories of 12 programming on its distant signals? 13 A. It is possible that could reflect a 14 change, but, again, it is also possible it may 15 not, if they want to keep consistent 16 programming to keep -- retain subscribers. 17 Q. Okay. So now I would like to look at 18 a specific example of a paired comparison from 19 your scatter plots. And, Geoff, if you could 20 pull up slide 1. 21 So this graph is taken from 22 Exhibit V-3 of your rebuttal testimony. And 23 here I just highlighted one observation as a 24 point of reference. 25 A. Okay.</p>

<p style="text-align: right;">3463</p> <p>1 Q. And you gave us sort of an overview of 2 what these types of scatter plots in your 3 testimony sort of reflect, and the different 4 numbers that are represented here, but just 5 sort of as a quick refresh, so the observations 6 here are showing a cable system, a cable 7 system's response in, in this instance, 2011 8 compared to 2012 for the sports category? 9 A. Yes, from the Bortz surveys, correct. 10 Q. And I see here the dots, for lack of a 11 better word, different sizes. Does that mean 12 that some of the dots represent different 13 numbers of cable systems? 14 A. Different numbers of respondents and 15 the respondents coming from CSOs, yes. 16 Q. And, again, the 45-degree line here, 17 this shows systems that gave the exact same 18 valuation to sports in 2011 and 2012? 19 A. That's correct. 20 Q. And in order to fall on this line, a 21 system has -- a system has to have exactly the 22 same response in both years? 23 JUDGE BARNETT: Mr. Adkins, I'm sorry. 24 This slide says it is restricted. 25 MR. ADKINS: Yes, Your Honor. So at</p>	<p style="text-align: right;">3465</p> <p>1 Q. And what this shows for this one 2 respondent is in 2011, the respondent allocated 3 45 percent to sports? 4 A. Yes, I believe that's right. 5 Q. And then in 2012, that same respondent 6 allocated 30 percent to sports? 7 A. Yes, that appears to be accurate. 8 Q. So a 15-point drop from one year to 9 the next? 10 A. A 15 percentage point drop, yes. 11 Q. 15 percentage point drop. Okay. 12 Now I would like to look at the 13 particular system reflected by this dot. And, 14 Geoff, could you pull up slide 2. 15 JUDGE BARNETT: And this is 16 restricted? 17 MR. ADKINS: I apologize. Yes, we're 18 now getting into restricted information. 19 JUDGE BARNETT: Anyone in the hearing 20 room who is not privy to restricted 21 confidential information, please wait outside 22 until we are finished with this part of the 23 examination. 24 (Whereupon, the trial proceeded in 25 confidential session.)</p>
<p style="text-align: right;">3464</p> <p>1 this point this is not -- this slide doesn't 2 contain any system-specific information, but 3 thank you for reminding me. We will very 4 quickly be moving into some restricted 5 system-specific information. 6 JUDGE BARNETT: Thank you. This 7 points out the need to specify when a document 8 is filed as restricted exactly what parts of it 9 are restricted rather than a global 10 restriction. Go ahead. 11 MR. ADKINS: Thank you, Your Honor. 12 BY MR. ADKINS: 13 Q. Just quickly circling back, do the 14 wider circles on the graph show -- does that 15 mean there are more systems, so a larger circle 16 reflects a greater number of respondents than a 17 smaller circle? 18 A. Yes. And the way I would try to 19 explain that is the smallest circles represent 20 one system, one respondent. The next largest 21 circles would represent two. And then the next 22 largest three and so on. 23 Q. Okay. And so looking at the 24 highlighted circle here that is one respondent? 25 A. Yes, I believe that is one respondent.</p>	<p style="text-align: right;">3474</p> <p style="text-align: center;">O P E N S E S S I O N</p> <p>1 BY MR. ADKINS: 2 Q. So as between the Bortz survey and the 3 Horowitz survey, there were significant 4 methodological differences between the two 5 surveys? 6 A. I'm not sure I agree with that. 7 Q. You don't agree that the -- any of the 8 methodological differences between the two 9 surveys were significant? 10 A. No. I think what I said, at least in 11 my initial testimony, was that the Horowitz 12 survey attempted to mimic the Bortz survey. I 13 think that's what Mr. Horowitz himself said, 14 except for a few changes, some of which, I 15 think both of which we went over in my 16 testimony. That's how I would characterize the 17 difference in the surveys. 18 Q. Okay. And I guess I would like to ask 19 you a little more about that. 20 Geoff, could you pull up page 27 of 21 Dr. Stec's testimony. 22 So if we look at the paragraph here at 23 the top of the page, here you are discussing 24 the Horowitz survey's use of descriptions and 25</p>

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<p>1 examples. And the last sentence here, "this 2 difference demonstrates the descriptions and 3 examples included in the survey had a direct 4 and significant effect on the results of the 5 survey." 6 So at least with respect to the 7 Horowitz survey's use of examples, you would 8 agree that that was a significant difference 9 between the two surveys? 10 A. Well, this is in the context of the 11 sports category that I went through in my 12 direct testimony. And there it was clear with 13 the addition of this "other sports" category 14 that there was an effect. That was part of 15 what I testified to. 16 So that's what this is in reference 17 to. 18 Q. Okay. Is this a yes? 19 A. Well, you seem to suggest that there 20 would be a difference here that wasn't 21 accounted for in my comparison. If you recall 22 from my direct testimony, I combined the "other 23 sports" category and the "live sports" category 24 into a combined sports category for the 25 purposes of comparing Horowitz versus Bortz.</p>	<p>1 MR. OLANIRAN: Objection, Your Honor, 2 this is vague and ambiguous. 3 BY MR. ADKINS: 4 Q. Did you understand what I was going to 5 say? 6 A. I was going to restate your question 7 to make sure I understood it. 8 Q. Please do. 9 A. So what you are suggesting is the 10 Bortz survey respondents were misunderstanding 11 what Bortz was referring to when he described 12 the live team sports and they were lumping in, 13 I guess, part of the programming into another 14 category outside of the live team sports? 15 Q. No. I was just asking was that your 16 assumption in comparing live team sports in 17 Bortz to a combined "live team sports" and 18 "other sports" category in Horowitz? 19 A. No, I think the way I -- the way I 20 said it in my direct testimony, the way I would 21 say it again is that in my opinion, the subset 22 "other sports" and the subset "live team 23 sports" as defined by Horowitz, can be combined 24 together to be compared then to the Bortz 25 definition of sports, live sports and then</p>
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<p>1 Q. And just so I'm clear in doing that, 2 your assumption in comparing the Bortz "live 3 team" sports category to the Horowitz "other 4 sports" and as you called it play-by-play 5 sports, was that in Bortz, respondents would be 6 lumping the "other sports" into the "live team 7 sports" category? 8 A. That appears to be the case. 9 Q. So that's an assumption that if we 10 didn't make that, then we wouldn't expect, for 11 instance, in the year-over-year sports 12 comparison we did, live team sports in Bortz to 13 combine sports in Horowitz, we wouldn't expect 14 those to be necessarily the same? 15 A. I'm not sure I followed your question. 16 Q. Sorry. I will rephrase. 17 So if the Bortz respondents weren't 18 actually lumping "other sports" into the "live 19 team sports" category, for instance, NASCAR, 20 they weren't considering that part of live team 21 sports, they were considering it syndicated, 22 then we wouldn't expect the exact same 23 valuation between Bortz's sports category and 24 the Horowitz other sports plus live team 25 sports?</p>	<p>1 ultimately compared on that basis. 2 Q. Okay. So I guess just to be clear 3 then, you assumed the Bortz respondents were 4 assigning non-team sports value to the live 5 team sports category? 6 A. I was assuming that they were making 7 the "live team sports" category more broad than 8 the proceedings has defined it. 9 Q. And if they weren't making it more 10 broad, then we wouldn't expect Bortz "live team 11 sports" to correlate with the combined 12 category? 13 A. It is still -- well, I'm not sure what 14 you mean by correlate. It could still 15 correlate with the category. I'm not sure. 16 Q. You wouldn't expect the exact same 17 valuation? 18 A. Potentially not, no. 19 Q. Okay. So we just talked about use of 20 examples in Horowitz as one methodological 21 difference. And there were others, "other 22 sports" as we have just discussed. 23 And there was also a methodological 24 difference in the way that respondents were 25 asked about programming for WGN-only systems.</p>

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3479	<p>1 Right?</p> <p>2 A. Which survey are we talking about?</p> <p>3 Q. So Bortz provided WGN-only respondents</p> <p>4 with a list of the compensable programming on</p> <p>5 WGN and Horowitz did not?</p> <p>6 A. I don't recall that specifically, but</p> <p>7 if you are saying that's what happened, I'm</p> <p>8 willing to accept that.</p> <p>9 Q. Okay. So considering these</p> <p>10 methodological differences, I'm going to ask</p> <p>11 you to assume for the sake of argument that the</p> <p>12 methodological differences in the Horowitz</p> <p>13 survey biased the questions in that survey.</p> <p>14 Assuming that, I am just asking you to</p> <p>15 assume it.</p> <p>16 A. Can we be more specific about what you</p> <p>17 mean by "methodological differences"?</p> <p>18 Q. Well, the differences that we just</p> <p>19 described.</p> <p>20 A. So this is with respect to sports, the</p> <p>21 categorization of sports?</p> <p>22 Q. We can focus just on sports.</p> <p>23 A. Okay.</p> <p>24 Q. Assuming that the Horowitz survey's</p> <p>25 questions were biased, then we wouldn't or</p>	3481	<p>1 confidential session.)</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
3480	<p>1 shouldn't expect cable operators to give the</p> <p>2 same valuation to the sports category in Bortz</p> <p>3 as they give to the sports category in</p> <p>4 Horowitz?</p> <p>5 A. I think it depends on the magnitude of</p> <p>6 the bias and the rationale, the reason the bias</p> <p>7 is occurring. So it is possible that could be</p> <p>8 the case. It is also possible, at least I can</p> <p>9 conceive of ways that it wouldn't be the case.</p> <p>10 Q. And I would like to -- I was confused</p> <p>11 by something that you -- that was presented in</p> <p>12 one of the demonstratives comparing Bortz and</p> <p>13 Horowitz responses across a number of</p> <p>14 categories. And I would just like your help in</p> <p>15 understanding what you were comparing.</p> <p>16 A. Okay.</p> <p>17 Q. If you could turn to Exhibit -- this</p> <p>18 is 4.4 in your testimony. And, Geoff, if you</p> <p>19 could pull up the ELMO, I can put it up.</p> <p>20 And I thank you for reminder. This is</p> <p>21 -- we're back in restricted territory.</p> <p>22 JUDGE BARNETT: It appears our</p> <p>23 visitors left anyway, but if you would close</p> <p>24 the door.</p> <p>25 (Whereupon, the trial proceeded in</p>	3487	<p>1 C O N T E N T S</p> <p>2 WITNESS: DIRECT CROSS REDIRECT VOIR DIRE</p> <p>3 DANIEL HARTMAN</p> <p>4 By Mr. Cantor 3169</p> <p>5 By Ms. Plovnick 3177</p> <p>6 By Mr. MacLean 3235</p> <p>7 JOEL H. STECKEL</p> <p>8 By Mr. Olaniran 3254</p> <p>9 By Mr. Laane 3334</p> <p>10 JEFFREY A. STEC</p> <p>11 By Mr. Olaniran 3373</p> <p>12 By Mr. Adkins 3454</p> <p>13 CONFIDENTIAL SESSIONS: 3204:21-23, 3245:25-3246:20,</p> <p>14 3246:23-3247:17, 3423-3426, 3466-3473, 3482-3486</p> <p>15 AFTERNOON SESSION: 3305</p> <p>16 E X H I B I T S</p> <p>17 EXHIBIT NO: MARKED/RECEIVED REJECTED</p> <p>18 1120 3468</p> <p>19 1121 3468</p> <p>20 1122 3468</p> <p>21 1123 3468</p> <p>22 6041 3185</p> <p>23 6042 3185</p> <p>24 6043 3185</p> <p>25 6044 3185</p>

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